Supreme Court, U.S.
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No._____

In the

SUPREME COURT OF THE UNITED STATES

October Term 1998

SEAGATE TECHNOLOGY, INC., *Petitioner,*

vs.

MAUDIE BEAIRD, MILDRED BOBO,
JERLENE BUSH, ROSA CLARK,
WILLIAM HENSON, CLAUDIA JOHNSON,
MARGARET JONES, RUTH NORAN,
MARJIE FERGUSON, LEONARD FLANNERY,
THOMAS FLYNG, GERALD LECOMPTE,
SHIRLEY MCCARTNEY, DIANNA G. WOODS, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

This is an action under Title VII and the ADEA brought by multiple former employees of petitioner who were terminated during a reduction in force ("RIF"). The district court granted summary judgment for petitioner and the Tenth Circuit reversed in a published decision. The Honorable Deanell Reece Tacha (the "Dissent") concurred in part and dissented in part. The question for review is best articulated by the Dissent:

> We have presumed, as have some other circuits, that in St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), the Supreme Court foreclosed the approach that I suggest here . . . . Hicks addressed whether, following a bench trial, a court must necessarily enter judgment for an employee-plaintiff upon a finding that the reasons offered by the employer for the employee's discharge were pretextual . . . .
>
> The Court, however, did not address the question that I pose here: *whether, despite a showing of pretext, the court can enter judgment as a matter of law for the employer at the summary judgment stage.* The following oft-quoted language from Hicks is the source of disagreement on this question: "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of a prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination. . . . [and] upon such rejection, '[n]o additional proof of discrimination is required . . . .'"
>
> * * *
>
> This Circuit's treatment of pretext evidence has inappropriately circumscribed district courts' powers under Rule 56 . . . . I believe the proposition that an employer can never succeed at summary judgment upon a showing of pretext is inconsistent with Rule 56 and is not, as we have presumed, dictated by Supreme Court precedent.

LIST OF PARTIES

The caption of the case in this Court contains the names of all the parties. The petitioner has no parent companies, and all of its subsidiary companies are wholly owned.

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OPINIONS BELOW

This action was removed to in the United States District Court for the Western District of Oklahoma, and that court entered summary judgment for petitioner. The order granting petitioner's motion for summary judgment is reprinted in Appendix "A". There is no official citation to that order.

Respondents appealed to the United States Court of Appeals for the Tenth Circuit, Case Nos. 96-6087 and 96-6145, and that court entered a published opinion on May 28, 1998, affirming in part and reversing in part. Judge Tacha concurred in part and dissented in part. A copy of the published opinion is reprinted in Appendix "B". The official citations for the opinion are Beaird v. Seagate Technology, Inc., 145 F.3d 1159, 1998 WL 271563, 66 U.S.L.W. 2780, 76 Fair Empl. Prac. Cas. (BNA) 1865 (10th Cir. May 28, 1998).

BASIS FOR JURISDICTION IN THIS COURT

This action was filed in the District Court of Oklahoma County, Oklahoma, and was timely removed to the United States District Court for the Western District of Oklahoma. Federal jurisdiction existed under 28 U.S.C. §§ 1331, and 1441-1448. The district court entered summary judgment resolving all claims between all parties. Respondents timely appealed to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit entered its published opinion on May 28, 1998. None of the parties sought rehearing. This petition is timely filed under Supreme Court Rule 13(1), and this Court has jurisdiction under 28 U.S.C. § 1254(1).

Pursuant to Supreme Court Rule 14(e), petitioner provides the following specific information:

(i) Date the Judgement or Order Sought to be Reviewed was Entered:

May 28, 1998, the date of the Tenth Circuit's opinion.

(ii) Date of Any Order Respecting Rehearing/Extension of Time:

No petition for rehearing was filed. No request for an extension of time to file the petition for a writ of certiorari was made.

(iii) Rule 12.5 Considerations:

Not applicable in this petition.

(iv) Statutory Provision Conferring Jurisdiction:

28 U.S.C. Section 1254(1).

(v) Rule 29.4 Statement:

Not applicable.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

Federal Rule of Civil Procedure 56(c):

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

Petitioner designs, manufactures and markets disc drives for computer systems. It has operations worldwide. During October, 1993, petitioner employed approximately 43,100 persons worldwide, with approximately 2,100 in its Oklahoma City facility.

Petitioner has conducted three RIFs at its Oklahoma City facility. After the first two RIFs, four terminated employees sued petitioner in the United States District Court for the Western District of Oklahoma. Furr

v. Seagate Technology, Inc., 82 F.3d 980 (10th Cir. 1996); Doan v. Seagate Technology, Inc., 82 F.3d 974 (10th Cir. 1996). In those matters, the district court denied petitioner's motions for judgment as a matter of law and the cases proceeded to trial resulting in adverse verdicts. On appeal, a Tenth Circuit panel reversed outright, holding that the district court should have granted petitioner's motions for judgment as a matter of law. See Furr/Doan, 82 F.3d at 979, 988. The panel did not remand for a new trial but directed the district court to enter judgment for petitioner. Id.

This action arises from the third and latest RIF during October, 1993. In the third RIF, petitioner's senior management decided to redirect the focus of the Oklahoma City facility primarily toward research and development, with little or no volume manufacturing. The volume manufacturing performed by the Oklahoma City facility would be transferred to petitioner's Singapore facility, as would most of the repair operations previously performed in Oklahoma City. This would leave the Oklahoma City facility with a focus on research and development, but with enough manufacturing capability to assist the R&D function. The Oklahoma City facility's repair operations would continue on a smaller scale.

With volume manufacturing and repair services being transferred, it was necessary for petitioner to reduce the number of employees in Oklahoma City. Seagate did so by conducting the RIF during October, 1993. Prior to any full-time employee being laid off, petitioner released temporary or contract employees who were working in its Oklahoma City facility. More than 600 temporary employees were notified and actually released between May and October. All 275 full-time employees who were to be affected by this RIF were notified on August 2, 1993 that they would be laid off during October.

Petitioner's four RIF selection criteria are set out in its employee handbook. See Beaird, 145 F.3d at 1162. These criteria are undisputedly nondiscriminatory on their face. The first criteria, operational requirements, resulted in 275 individual positions being identified for elimination during the RIF. The employees occupying these positions were selected under the remaining criteria.

The second criteria, performance, was measured by two standards. The most frequent was the numerical rating each employee received on his or her last written performance evaluation. The second performance standard was based upon documented disciplinary actions.

The third RIF criteria was the opinion of each employee's supervisor on that person's "potential," which was defined to include the following factors: adaptability; promotability; initiative; flexibility; skills; team memberships; training; receipt of awards; and volunteering for overtime work.

The last criteria, to be used as a tie-breaker only, was an employee's credited seniority.

The RIF selection process was driven entirely by a comprehensive employee information report, which broke down petitioner's operations by job code, listing individualized information on all employees who work in that particular job code. The employee information report included more than ten thousand data entries for the Oklahoma City workforce. Petitioner's Oklahoma City Human Resources staff managed the RIF selection process. All of the respondents' positions were affected due to operational requirements. The respondents were selected based upon the numerical rating on their last written performance evaluation with ties being broken in favor of the most senior employee. The Human Resources staff used the Report for each job code to identify the lowest rated performer. The 1993 RIF was performed in a more objective and mechanical fashion than the 1991 RIFs, in part because of the lengthy and expensive litigation that followed the earlier RIFs.

There were originally two lawsuits brought by twenty seven plaintiffs who were terminated in the third RIF.[1] This time, the district and appellate courts reached completely opposite conclusions from those

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[1] The two lawsuits were originally filed in the District Court of Oklahoma County, Oklahoma, and alleged violations of state and federal law, including Title VII and the Age Discrimination in Employment Act. Petitioner timely removed both lawsuits into the United States District Court for the Western District of Oklahoma under 28 U.S.C. Section 1331, and 1441 through 1447, Beaird, et al. v. Seagate Technology, Inc., Case No. CIV-94-1473-M and Abooghadareh v. Seagate Technology, Inc., Case No. CIV-94-1474-M.

reached in the lawsuits arising from the first two RIFs. Cf. Furr/Doan, 82 F.3d at 979, 988.[2] The district court granted petitioner's motion for summary judgment, but a Tenth Circuit panel (composed of different members than the panel in the lawsuits arising from the first two RIFs) reversed, holding that the case should have proceeded to trial.[3]

After petitioner filed its motion for summary judgment, fourteen plaintiffs voluntarily dismissed their claims. The district court granted summary judgment in favor of petitioner against eleven plaintiffs. Eight plaintiffs, respondents herein, appealed to the Tenth Circuit asserting two errors. Beaird, 145 F.3d at 1162.

First, respondents argued that the district court erred by denying their request for leave to file a reply brief (by local rule, in the Western District of Oklahoma, reply briefs could only be filed with permission of the court). The Tenth Circuit rejected this argument by respondents and held that the district court did not err in denying respondents' application for leave to file a reply brief. Beaird, 145 F.3d at 1164-65.

Second, respondents argued that there were disputed issues of material fact with respect to each plaintiff and that summary judgment was improper. Beaird, 145 F.3d at 1165-76. The court evaluated the respondents' claims under the burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Beaird, 145 F.3d at 1165. The panel held that the respondents established prima facie age discrimination cases, and that petitioner asserted a facially nondiscriminatory reason for the terminations, the RIF itself.

The dispute between the majority and the Dissent arose, however, on the issue of pretext. Relying on an earlier Tenth Circuit decision, Randle v. City of Aurora, 69 F.3d 441, 451 (10th Cir. 1995), the majority

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[2] The panel split in Beaird was between the majority consisting of Circuit Judge Lucero and District Judge Wiley E. Daniel from the District of Colorado, sitting by designation, and Circuit Judge Tacha who concurred in part and dissented in part.

[3] The panel in those appeals consisted of Tenth Circuit Judges Baldock, McWilliams, and Kelly.

held that an employee can defeat an employer's motion for summary judgment simply by showing that the employer's proffered reason for the termination was "unworthy of belief" -- without offering any evidence that the true reason was discrimination. Beaird, 145 F.3d at 1165. The majority also held that at the summary judgment stage, the court could not consider evidence of petitioner's treatment of other older or minority employees who were retained. See id. at 1178 (Tacha, J., explaining fallacy in that particular holding). Thus, the majority examined each employee's particular situation, completely divorced from the RIF itself.

The court held that each of the respondents raised an inference that petitioner's proffered reason for the termination could be unworthy of belief when the evidence is viewed in the light most favorable to the respondents. This was primarily because each of the respondents could show that younger or non-minority employees were retained in the relevant job codes also held by the respondents. The majority refused to examine, however, the number of employees retained who were older than the respondents, who were minorities like the respondents, and the employer's job code and plant-wide age and minority demographics.

Rather than look at the RIF and its results in context, the majority found a "genuine issue of material fact" through comparing a first draft of the employee information report to the final version and finding a few changes and updates out of the thousands of entries. (Exhibit 53, first discussed in Beaird, 145 F.3d at 1163). Thus, the majority turned their back on the fact that after the October, 1993 RIF, the percentage of Seagate's employees over age 40 in Oklahoma City increased from 56 % to 59%, and that in many of the various job codes, the percentage of persons in protected classes remained the same or even increased. In fact, the majority held that this could not even be considered at the summary judgment stage. Beaird, 145 F.3d at 1168.[4]

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[4] It is noteworthy that after petitioner conducted its first RIFs, the obligatory rounds of lawsuits followed, and the United States District Court for the Western District of Oklahoma denied Seagate's pre-trial and post-trial motions for judgment as a matter of law. Following jury verdicts for the plaintiffs, the petitioner appealed and another panel of the Tenth Circuit reversed outright, holding that there were no material issues of fact and that petitioner should have been granted judgment as a matter of law. See, e.g., Furr v. Seagate Technology, Inc., 82 F.3d 980, 983 (10th Cir. 1996); Doan v. Seagate Technology, Inc., 82

In her Dissent, Judge Tacha opined that "this Circuit's treatment of pretext evidence has inappropriately circumscribed district courts' powers under Rule 56 of the Federal Rules of Civil Procedure.... I believe the proposition that an employer can never succeed at summary judgment upon a plaintiff's showing of pretext is inconsistent with Rule 56 and is not, as we have presumed, dictated by Supreme Court precedent." Beaird, 145 F.3d at 1176. Her position is that to defeat summary judgment in an employment discrimination suit, a plaintiff must present evidence: 1) that creates a genuine issue of material fact about whether the employer's stated reason for the termination was not what actually motivated the employer; and 2) from which a reasonable juror could infer that unlawful discrimination was a determinative factor in the plaintiff's termination. Id. It is petitioner's position that this is precisely the holding of this Court in St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

The Dissent relied on an en banc decision from the Fifth Circuit, Rhodes v. Guibertson Oil Tools, 75 F.3d 989, 994 (5th Cir. 1995) (en banc); and published decisions from the First and Eleventh Circuits, Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F.3d 436, 440-41 (11th Cir. 1996)(per curiam), cert. denied, 117 U.S. 2511 (1997); Woods v. Friction Materials, Inc., 30 F.3d 255, 260 n.3 (1st Cir. 1994). However, she noted that the Third Circuit disagreed with this position in Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1067 (3d Cir. 1996). See generally Beaird, 145 F.3d at 1176. Also, she noted that other circuits apply a "pretext-plus" standard, which has been rejected by the Tenth Circuit. See id. at 1177; see also Gillins v. Berkeley Elec. Cooperative, Inc., No. 97-1375, __ F.3d __, 1998 WL 381092 at *4 (4th Cir. Jul. 9, 1998)(applying "pretext-plus" standard). Thus there are three different standards applied by the Circuits.

F.3d 974, 975-76 (10th Cir. 1996). Now, in this subsequent RIF, petitioner is confronted with another Tenth Circuit panel decision holding that certain alleged inconsistencies -- similar to those raised in the prior cases -- could give rise to a jury finding of pretext, and reversing summary judgment. For yet another inconsistent summary judgment case involving respondent, see Enowmbitang v. Seagate Technology, Inc., No. 98-1097, 1998 WL 351244 (8th Cir. July 2, 1998).

ARGUMENT FOR GRANTING THE WRIT

As explained in Judge Tacha's Dissent, the Tenth Circuit's decision effectively destroys an employer's ability to obtain summary judgment. The Dissent suggests that Supreme Court clarification in this area is urgently needed. This past term, the Court provided important clarification of substantive employment discrimination law in Burlington Indus., Inc. v. Ellerth, No. 97-569, 1998 WL 336326 (June 26, 1998); and Faragher v. City of Boca Raton, No. 97-282, 1998 WL 336322 (June 26, 1998). The favorable reception of those decisions by a wide spectrum of interests -- as simply settling the law once and for all -- demonstrates the importance of clarification in the burgeoning employment law area. Petitioner respectfully submits that clarification of this important procedural issue -- when a court must grant or deny summary judgment in an employment discrimination case -- is equally as important and merits immediate consideration by this Court.

According to the 1997 edition of the Judicial Business of the United States Courts, Table C-2A,[5] in 1997 there were 23,796 Civil Rights - Employment cases filed in the federal courts. The number of such cases has steadily increased over the past five years.

There is no magic about evidentiary proof in employment cases. The plaintiff virtually always makes a prima facia case and the employer virtually always articulates a legitimate, nondiscriminatory reason for its decision. The case then proceeds to the ultimate issue -- pretext, or more simply stated, who is telling the truth. Keeping in mind that both managers and employees are human beings, and issues of performance and perception of performance are most often subjective, it is relatively simple for the terminated employee to raise an issue on who is telling the truth, thus requiring a jury trial. The majority supports this, holding that all the employee has to do is find some inconsistency or aberration to raise a material issue of fact about whether the employer's proffered reason is pretextual. As the Dissent points out, this means that "an employer can

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[5] U.S. District Courts - Civil Cases Commenced, by Nature of Suit, During the Twelve Month Periods Ended September 30, 1993 through 1997 of the Administrative Office of the U.S. Courts.

never succeed at summary judgment upon a plaintiff's showing of pretext . . . ." Beaird, 145 F.3d at 1176.

An example of this is found in Beaird, 145 F.3d at 166 n.3, 1175. The majority notes that Seagate's explanation for terminating one respondent was because he was the only employee in his job code that received a "two" rating on his last performance evaluation, which was the lowest rating in that job code. Id. In other words, Seagate's explanation for terminating him was because his job performance was the least satisfactory of any employee in his job code. Id. However, the majority held that the employee insisted "that his work was satisfactory . . . which was sufficient to satisfy this element of the prima facie case." Id. at 1166 n.3. Thus, the employee created a genuine issue of material fact simply by disputing perceptions about the quality of his work recorded on a previous performance appraisal. The employee disputes Seagate's explanation, so he gets to proceed to a jury trial.

If the majority is correct, employers will lose summary judgment motions and most if not all employment discrimination cases will then be decided by juries comprised of employees. See id. Such a per se rule in this snowballing area of litigation will strain the federal judiciary beyond capacity. The Eleventh Circuit describes this per se rule as a "dramatic and hurtful-to-employers change in the law" that contravenes Hicks. Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F.2d 436, 443 (11th Cir. 1996)(per curiam), cert. denied, 117 U.S. 2511 (1997). Another dissenting circuit judge described this per se rule as a "spectacular wrong turn." Aka v. Washington Hosp. Ctr., 116 F.3d 876, 898 (Henderson, J., concurring in part and dissenting in part).

A. Inter-Circuit Conflict -- Supreme Court Rule 10(a).

As noted in the Dissent, the circuits are in disagreement regarding what an employment discrimination plaintiff must show to establish pretext sufficient to defeat summary judgment. See Beaird, 145 F.3d at 1176.

The Third (en banc), Sixth, Seventh, Ninth, Tenth, and D.C. Circuits (and arguably the Eighth Circuit en banc) have adopted a per se rule that a court must always deny an employer's motion for summary judgment if the plaintiff-employee can find some reason, when viewing the evidence in the light most favorable to the plaintiff, for arguing that the

employer's stated nondiscriminatory reason for the termination is "unworthy of belief." See Beaird, 145 F.3d at 1176; Kim v. Nash Finch Co., 123 F.3d 1046, 1056-57 (8th Cir. 1997); Aka v. Washington Hosp. Ctr, 116 F.3d 876, 879-86 (D.C. Cir. 1997)(divided panel, discussing inter-circuit conflict, with Henderson, J., concurring in part and dissenting in part); Ryther v. KARE 11, 108 F.3d 832, 836-38 (8th Cir.)(en banc), cert. denied, 117 S.Ct. 2510 (1997); Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1078 (3d Cir. 1996)(en banc, with Alito, J., concurring in part and dissenting in part, discussing inter-circuit conflict and "strong contrary authority, which the majority does not acknowledge"); Randle v. City of Aurora, 69 F.3d 441, 451-53 & nn.16, 17 (10th Cir. 1995); Manzer v. Diamond Shamrock Co., 29 F.3d 1078, 1083 (6th Cir. 1994); Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1122-23 (7th Cir. 1994)(discussing conflicting standards adopted in the Circuits); Washington v. Garrett, 10 F.3d 1421, 1433 (9th Cir. 1993)(divided panel with Thompson, J., dissenting). For example, the D.C. Circuit recently held:

> [T]hat a factfinder may infer discrimination based upon the combination of the plaintiff's prima facie case and the plaintiff's presentation of evidence sufficient to "discredit" the employer's proffered nondiscriminatory reasons for its challenged action, and . . . under Hicks, a defendant's motion for judgment as a matter of law must not be granted when the plaintiff has presented such evidence.

Aka, 116 F.3d at 881-82 (footnote omitted). This is the approach used by the majority in Beaird.

However, the First, Fourth, and Fifth (en banc) Circuits (and arguably the Second Circuit) hold an employee-plaintiff to a higher standard: the employee must not only show pretext, "but the pretextual evidence must be of a nature or quality from which a reasonable jury could infer illegal discrimination." Beaird, 145 F.3d at 1176; accord Rhodes v. Guibertson Oil Tools, 75 F.3d 989, 993 (5th Cir. 1996)(en banc with four separate opinions); Fischer v. Vassar College, 70 F.3d 1420, 1437-38 (2d Cir. 1995); Woods v. Friction Materials, Inc., 30 F.3d 255, 260 & n.2 (1st Cir. 1994). The most recent addition to this position is the Fourth Circuit which held last month:

> This court has adopted what is best described as the "pretext plus" standard for summary judgment in employment discrimination cases. See Vaughan v. Metrahealth Companies, Inc., 145 F.3d 197, 201-02 (4th Cir. 1998).
>
> To survive a motion for summary judgment under the McDonnell Douglas paradigm the plaintiff must do more than merely raise a jury question about the veracity of the employer's justification. The plaintiff must have developed some evidence on which a juror could reasonably base a finding that discrimination motivated the challenged employment action.

Gillins v. Berkeley Elec. Cooperative, Inc., No. 97-1375, _ F.3d _, 1998 WL 381092 at **3-4 (4th Cir. Jul. 9, 1998). This is the standard urged by the Dissent in Beaird, 145 F.3d at 1176-77.

The Eleventh Circuit has expressed "worry that there is some conflict in the case law of this circuit . . . . The conflict concerns whether a plaintiff . . . carries his burden of proof on discrimination just by showing a basis in the record for disbelief of the employer's reason. The origin of this conflict is the Supreme Court's opinion in Hicks." Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F.2d 436, 400-41 (11th Cir. 1996)(per curiam), cert. denied, 117 U.S. 2511 (1997); id. at 443 n.4. Contra Combs v. Plantation Patterns, 106 F.3d 1519, 1535-36 (11th Cir. 1997)(divided panel, discussing inter-circuit conflict, with Black, J. specially concurring).

The Eight Circuit enigmatically disclaims the disbelief-of-employer-alone standard (similar to the First, Fourth and Fifth Circuits), but requires the denial of summary judgment if the plaintiff establishes a prima facie case and submits evidence to discredit the employer's explanation (similar to the Third, Sixth, Seventh, Ninth and Tenth Circuits). See Kim, 123 F.3d at 1056-57. The Second Circuit also has vague and conflicting decisions on this issue. Compare Fisher, 70 F.3d at 1437 (quoting Woods, 30 F.3d at 261 n.3) with EEOC v Ethan Allen, Inc., 44 F.3d 116, 120 (2d Cir. 1994)("A finding of pretextuality allows a juror to reject a defendant's proffered reasons for a challenged employment action and thus permits the ultimate inference of discrimination").

Numerous courts have acknowledged (or attempted to gloss over[6]) the circuit conflict on this issue. See, e.g., Beaird, 145 F.3d at 1176; Aka, 116 F.3d at 882 (acknowledging that the dissent's approach "reflects the approach taken by two of our sister circuits. . ."); Combs, 106 F.3d at 1536 (noting that the First and Fifth Circuits had expressed a contrary view); Sheridan, 100 F.3d at 1068 n.7 (disagreeing with dissent that four opinions from other circuits constituted "strong contrary authority," but noting that at least one "runs counter to the majority of circuits"); Isenbergh, 97 F.3d at 443 (noting the "ostensible conflict in this circuit's law").

As the Dissent observed, if the majority and is correct, "an employer can never succeed at summary judgment upon a plaintiff's showing of pretext...." Beaird, 1998 WL at *17. That is an extremely important issue of federal law directly affecting almost 24,000 civil cases in federal court alone. The inter-circuit conflict noted by the Dissent is premised on different interpretations of Hicks, 509 U.S. at 511, which was decided five years ago. The conflict is also rooted in this Court's trilogy of summary judgment cases, including Anderson, 477 U.S. at 251-52, which were decided twelve years ago.

Thus, there is a well-established six-to-three inter-circuit conflict, one intra-circuit conflict, at least three en banc decisions, numerous divided panels, and two circuits with vague and/or conflicting decisions on this issue. Hardly a more ripe and important conflict could exist. The issues and principles that will determine which side is correct have existed for many years and there has been sufficient percolation to permit studied and accurate resolution by this Court.

B. Unsettled Question -- Supreme Court Rule 10(c).

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[6] For example, last year, the majority in a divided Eleventh Circuit panel tried to suggest that Isenbergh's concern about an intra-circuit conflict was mere "dicta." Combs, 106 F.3d at 1532-35. The same panel suggested that there was unanimity in the circuits -- including the Fourth Circuit -- regarding the meaning of Hicks. See id at 1535. The Fourth Circuit's statement last month that it employs the "pretext-plus" standard proves otherwise. See Gillins, 1998 WL 381092 at *3.

The Dissent notes that the "oft-quoted language from Hicks is the source of disagreement on this question." Beaird, 1998 WL 271563 at *20 (quoting Hicks, 509 U.S. at 511). The question that the lower courts are routinely asking is whether this Court meant that if there is even the remotest possibility that the factfinder could disbelieve the employer's proffered reason for the termination, when coupled with reviewing the evidence in the light most favorable to the employer, summary judgment for the employer must be denied. See Beaird, 1998 WL 271563 at *20; Isenbergh, 97 F.3d at 441-42 (noting that the Eleventh Circuit's conflict and confusion originate from Hicks); Aka, 116 F.3d at 898 (Henderson, J., dissenting); Sheridan, 100 F.2d at 1066 (question is "still open").

Many courts and commentators believe that "the language in Hicks is not so emphatic as to require courts to automatically deny a defendant's summary judgment motion when pretext has been established." Id. at *20-21 (agreeing with the "sensible interpretation" of the Hicks language); Deborah C. Malamud, The Last Minuet: Disparate Treatment After Hicks, 93 Mich. L. Rev. 2229 (1995). A leading treatise states:

> Although the Hicks majority professed that its opinion was unambiguous and clear, many readers have found it to be otherwise. The opinion at best contains internal tensions; at worst, portions of the majority opinion simply say inconsistent things. Not surprisingly, therefore, plaintiffs and defendants present entirely different readings of Hicks.

Lindemann and Grossman, Employment Discrimination Law, 3rd Ed., Vol. 1, ABA Section of Labor and Employment Law, p. 24, 1996. West Publishing Company's Hornbook series states, "Post-St. Mary's decisions reflect the raft of interpretive problems the Court left in the wake of its contrapuntal opinion." Harold S. Lewis, Jr., Civil Rights and Employment Discrimination Law, p. 232, West Publishing Company, 1997.

This case presents an opportunity for this Court to enlighten the lower courts about precisely what the "oft-quoted" language in Hicks means. There is an anxious audience.

C. Conflict with Relevant Decisions of this Court -- Supreme Court Rule 10(c).

Both sides of the inter-circuit conflict cannot be correct in their interpretation of Hicks; some courts are wrong and have misapplied it. Clarification by this Court is necessary. However, there is not only a conflict with Hicks, as Judge Tacha explained: "in my judgment, adherence to this per se rule eviscerates the requirement of Rule 56 and the Supreme Court's Liberty Lobby decision that there must be a genuine issue of material fact for the case to proceed beyond summary judgment." Beaird, 145 F.3d at 1178. The Eleventh Circuit has likewise expressed skepticism:

> that the Supreme Court intended to remove an entire category of cases from traditional consideration under Fed. R. Civ. P. 50 or 56 . . . . We doubt the Supreme Court intended to command such a dramatic and hurtful-to-employers change in the law when the Court decided Hicks: a decision which did not contract but expanded, the universe of discrimination cases where judgment for employers would be permissible . . . . We think the Supreme Court would have set out such an important new rule -- one that, in effect, partly nullifies two of the Federal Rules of Civil Procedure -- conspicuously and plainly so that no Article III judge could miss it.

Isenbergh, 97 F.3d at 443.

Rule 56 does not discriminate between employment cases and other cases, and this Court has not ever held that it does. Rule 56 is supposed to apply in federal employment cases in the same way it applies in other lawsuits. Indeed, "summary judgment is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). Moreover, "Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses

to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis." Id.

The per se rule in the Tenth Circuit effectively kills Rule 56, Liberty Lobby, and the other summary judgment trilogy cases, and prevents an employer from demonstrating that the employment claims have no factual basis. See Beaird, 145 F.3d at 1176, 1177-78; accord Isenbergh, 97 F.3d at 443.

D. Context Evidence/Amplified Concerns In RIF Situations -- Supreme Court Rule 10(c).

The issues discussed above have additional significance when they arise in the context of company-wide reductions in force. In RIF situations, unlike individual termination situations, a group of employees are terminated. It is all the more essential that the context and demographics of the RIF should be evaluated at the summary judgment stage.

Citing Furnco Constr. Corp. v. Walters, 438 U.S. 567, 579 (1978), the majority held that "statistical evidence cannot defeat the pretext claim of an individual plaintiff where the plaintiff's case rests on non-statistical evidence." Beaird, 145 F.3d at 1168; accord id. at 1165 n.2. The Dissent, however, argued that "the majority's assertion that we cannot consider Seagate's treatment of other employees misses my point. We have an obligation to consider the quality of the pretext evidence that the plaintiff offers." Id. at 1178.

The following example proves the fallacy of the majority's position and its misapplication of Furnco. Assume that a black-owned business has 100 employees, 60 of whom are black, 30 of whom are hispanic, and 10 of whom are white. Because of economic reasons, the company decides to eliminate 10 employees. The composition of the RIF is: 1 black, 3 hispanics, and 6 whites. If anything, the demographics of this RIF could support an inference of discrimination against white employees.

However, the "office messenger" job category has three employees, one black and two white. The company decides that it needs to eliminate one position in this job category. The company applies facially neutral RIF criteria and the result is that the black employee is terminated. Indeed, this

is the only black employee who is terminated in the entire RIF. The black employee then sues the black-owned business for alleged racial discrimination.

The employer files a motion for summary judgment arguing that it is a minority owned business, it does not discriminate against blacks, only one black employee was terminated in the entire RIF, and the percentage of terminated black employees is grossly disproportionate to the prior demographics of the work force (60% -- 60/100 -- of the pre-RIF workforce was black but only 10% -- 1/10 -- of the terminated employees were black).

In this situation, the evidence is "so one-sided" that the employer should prevail as a matter of law. Liberty Lobby, 477 U.S. at 252. This is true even if the employee could point to certain inconsistencies between preliminary and final employee information reports, manager comments, etc. However, in the Tenth Circuit, the district court cannot even consider the demographics and context in which the termination occurred. Instead, the court must deny summary judgment and permit the plaintiff to proceed to trial merely because he can show that he was black, he was terminated, two white employees in his job position were retained, and argue that he was a better performer than his personnel file shows. See Beaird, 145 F.3d at 1165 & n.2, 1168.

The result is that the court and the parties must incur the time and expense of a trial so that a jury can decide whether a black-owned business terminated the black employee because of his race. If this summary judgment framework governs the 24,000 case per year employment caseload of the federal judiciary, it is indeed a "spectacular wrong turn." Aka, 116 F.3d at 898.

In essence, the Tenth Circuit holds that despite overwhelming contextual evidence of nondiscrimination, the respondents can proceed to trial simply because they can find something to dispute when the evidence is viewed in the light most favorable to them. Requiring courts to blind themselves to the realities of reductions in force, especially at the summary judgment stage, creates injustice. As articulated by the Dissent in Beaird, 145 F.3d at 1176, 1177-78, such a rule in RIF cases violates this Court's holding in Liberty Lobby, compounding the aforementioned considerations under Supreme Court Rule 10(c). Accord Isenbergh, 97 F.3d at 443.

Also, in an era of corporate downsizing, employment discrimination cases arising from RIFs will undoubtedly proliferate. If, in these lawsuits, courts cannot consider context evidence at the summary judgment stage, there will be absurd results and unnecessary trials in RIF-related employment discrimination cases, as shown by the above example. This raises an important question of federal law that has not been, but should be, settled by this Court under Supreme Court Rule 10(c).[7]

Respectfully Submitted,

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Dated: August 26, 1998

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[7] Ironically, the majority recognizes that statistical evidence might be relevant in evaluating the plaintiff's case. See Beaird, 145 F.3d at 1168 (citing Fallis v. Kerr McGee Corp., 944 F.2d 743, 746 (10th Cir. 1991)). The majority says that the respondents could show that the job categories were manipulated to facilitate discrimination, but petitioner cannot show the opposite at the summary judgment stage.

APPENDIX A

Opinion of the Tenth Circuit in *Beaird, et. al. v. Seagate Technology, Inc.*, Dated May 28, 1998.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MAUDIE BEAIRD, MILDRED BOBO, JERLENE BUSH, ROSA CLARK, WILLIAM HENSON, CLAUDIA JOHNSON, MARGARET JONES, RUTH NORAN,

Plaintiffs - Appellants,

and

MARJIE FERGUSON, LEONARD and FLANNERY, THOMAS FUNG, GERALD LECOMPTE, SHIRLEY MCCARTNEY, DIANNA G. WOODS,

Plaintiffs,

Nos. 96-6087 96-6145

v.

SEAGATE TECHNOLOGY, INC.

Defendant- Appellee.

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. CIV-94-1473-M)

Mark Hammons, Hammons & Associates, Oklahoma City, Oklahoma, for Plaintiffs - Appellants.

Gary C. Pierson (Tony G. Puckett and Mark D. Spencer with him on the briefs), Lytle Soule & Curlee, Oklahoma City, Oklahoma, for Defendant - Appellee.

Before TACHA and LUCERO, Circuit Judges and DANIEL*, District Judge.

LUCERO, Circuit Judge.

This case arises from a reduction in force ("RIF") instituted in 1993 by defendant Seagate Technology, Inc., a manufacturer of computer equipment. As a result of the RIF, more than 200 employees at Seagate's Oklahoma City facility were laid off. Many of the laid-off employees had worked at the Oklahoma City facility for more than a decade. Some of the plaintiffs in this case had more than twenty years seniority when they were let go. Twenty-seven former employees sued Seagate for violation of various federal and state antidiscrimination laws. Some of the plaintiffs voluntarily dismissed their claims, and the district court granted Seagate summary judgment as to most of the others. The judgment became final when the remaining plaintiffs settled and the district court entered a final judgment. Eight plaintiffs remain parties to this appeal.

Plaintiffs raise two distinct objections to summary judgment. First, they argue that it was reversible error to allow Seagate to submit a reply brief with additional materials after plaintiffs had responded to Seagate's original summary judgment motion, but not to permit plaintiffs to file a surreply controverting the arguments and materials contained in the reply. Second, they contend that questions of material fact remain with respect to each plaintiff and that summary judgment was thus improper.

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* Honorable Wiley Y. Daniel, United States District Judge for the District of Colorado, sitting by designation.

I

In 1993, Seagate decided to reorganize its Oklahoma City facility and reduce the number of employees working there. According to the RIF procedures described in Seagate's employee handbook, "[i]n determining which employees will be subject to a reduction in force, the Company will take into account, among other things, operational requirements, performance and potential. Where these factors are equal, length of service will be taken into account." See Appellants' App. at 228.

In an affidavit submitted to the district court, Seagate's Director of Human Services, Lowell Yandell, elaborated on this scheme. According to Yandell, operational requirements dictated the total number of employees to be cut within each job code. Thereafter, employee performance determined which employees would number in the final lay-off total. Where one employee's performance ranking was equal to another's, length of service was used as a tiebreaker. If two employees had identical seniority, the employee born on the earliest day of the month was selected first.

For purposes of the RIF, Seagate measured performance in two ways. Employees who had recently been subject to formal disciplinary proceedings were chosen for lay-off before any other employee within their job code.[1] If there were no such documented disciplinary actions, Seagate stated that it considered the employee's most recent written performance evaluation rating, which was measured on a scale of one to five. For all plaintiffs, the most recent written performance evaluations were compiled in a "CHAPA" report, dated July 26, 1993, that also lists the date of their final evaluation. In some cases, employees were evaluated on a zero-to-500 point scale that was converted into a performance evaluation corresponding to the CHAPA one-to-five scale.

Plaintiffs alleged principally that the RIF, as applied to them, was a pretext for illegal discrimination. Seagate moved for summary judgment, asserting that all lay-off decisions were made in strict accordance with the RIF guidelines outlined above. In response, plaintiffs disputed that

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[1] This performance criterion was defined as encompassing employees who had received "first warnings" within 90 days of the RIF selections or had received more serious discipline within one year of the RIF. See Appellants' App. at 220.

contention by introducing a Seagate evaluation document as their Exhibit 53. Plaintiffs argued that this document showed they should have been retained in place of employees who were not laid off; that the RIF criteria, including potential and disciplinary history, were used selectively; and that strict seniority was not applied.

The district court then allowed Seagate to file a reply brief, in which it explained the preliminary nature of Exhibit 53 and reiterated that the RIF criteria had been consistently applied. Plaintiffs moved to strike Seagate's reply brief or, in the alternative, to file a surreply. The district court denied both motions. Thereafter, the district court granted Seagate summary judgment with respect to all of the appellants. As to appellants Clark, Bush, Bobo and Henson, the district court concluded that a prima facie case of discrimination had not been made. With respect to all eight appellants, it concluded that Seagate's RIF was a legitimate nondiscriminatory reason for termination and that appellants had failed to carry their burden of presenting facts that would allow a factfinder to conclude that the RIF was applied in a pretextual manner. Eight plaintiffs timely appealed.

II

Appellants first argue that the district court committed reversible error in allowing Seagate to file a reply after plaintiffs responded to Seagate's motion for summary judgment, while denying plaintiffs the opportunity to file a surreply. The substance of Seagate's reply is in three parts: (1) the existence of performance point totals inconsistent with the performance ratings used in the RIF had no effect on plaintiffs' selection for the RIF; (2) plaintiffs' previous attack on the use of potential as a criterion for RIF consideration now precludes assertions that the RIF did not properly consider potential; and (3) the voluntary dismissal of discrimination claims by many of the plaintiffs suggests the remaining plaintiffs likewise have no valid claims.

The parties disagree as to what standard of review we should apply to the district court's decision to allow a reply brief. Appellants argue that we should review the district courts's decision de novo. They contend that the district court's error is jurisdictional and, thus, requires reversal regardless of any showing of prejudice. Additionally, appellants argue that some of their number were in fact prejudiced by the district court's reliance

on new material to which they had no opportunity to respond. Seagate contends that we should review the district court's decision only for an abuse of discretion. Seagate argues that the district court acted within its discretion in allowing the company to file a reply brief without allowing plaintiffs a surreply and, further, that no unfair prejudice occurred as a result of the district court's consideration of Seagate's reply.

Federal Rule of Civil Procedure 56 implicitly requires the district court to allow the nonmoving party an opportunity to respond before summary judgment is entered against it. See Fed. R. Civ. P. 56(c) ("The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits."); Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986) ("[D]istrict courts are widely acknowledged to possess the power to enter summary judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence."). In our circuit, "[i]t is settled law that noncompliance with the time provisions of Rule 56(c) deprives the court of authority to grant the motion for summary judgment unless the opposing party has waived this requirement." Osbakken v. Venable, 931 F.2d 36, 37 (10th Cir. 1991). Here, appellants analogize Seagate's reply to an initial summary judgment motion, and suggest that the district court had no authority to grant summary judgment without allowing plaintiffs the opportunity to respond to the new materials.

Rule 56 neither authorizes nor forbids a reply brief by the party moving for summary judgment. In the absence of a specific federal rule, the Federal Rules of Civil Procedure permit federal judges to regulate practice "in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and local rules of the district." See Fed. R. Civ. P. 83(b). Under the local rules of the Western District of Oklahoma, authorized under Fed. R. Civ. P. 83(a), "[r]eply. . . briefs are not encouraged and may be filed only upon application and leave of Court." LR7.1(g) (1997). In this case, the district court's actions are properly viewed as stemming from the authority granted by Rule 83.

Although there is no clear statutory prescription as to the standard of appellate review, the permissive language of Local Rule 7.1(g) and of both provisions of Federal Rule 83 implies that we must give the district court appropriate deference on appeal. See Pierce v. Underwood, 487 U.S. 552, 558-59 (1988). Moreover, "[i]t is especially common for issues

involving what can broadly be labeled 'supervision of litigation' . . . to be given abuse-of-discretion review." Id. at 558 n.1. The question presented here, that of determining whether the district court may consider evidence and issues raised by the party moving for summary judgment in a reply brief without allowing the opposing party to respond, fits best within this "supervision of litigation" framework. Consequently, we review the trial court's managing its docket and supervising the parties in this respect for an abuse of discretion only. Cf. Walter v. Morton, 33 F.3d 1240, 1244 (10th Cir. 1994) (holding trial court did not abuse its discretion by denying summary judgment without giving movant opportunity to file reply brief).

Under the abuse of discretion standard, "a trial court's decision will not be disturbed unless [we have] a definite and firm conviction that the lower court has made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." McEwen v. City of Norman, 926 F.2d 1539, 1553-54 (10th Cir. 1991) (quoting United States v. Ortiz, 804 F.2d 1161, 1164 n.2 (10th Cir. 1986)). Appellants contend that the district court had no "permissible choice" but to allow a surreply once it had accepted the materials in Seagate's reply. That contention is incorrect. Having accepted the reply brief, the district court in fact had two permissible courses of action. It could either have permitted a surreply or, in granting summary judgment for the movant, it could have refrained from relying on any new material contained in the reply brief.

Rule 56(c) requires the nonmoving party to be given notice and a reasonable opportunity to respond to the movant's summary judgment materials. See Celotex, 477 U.S. at 326 (holding that summary judgment is to be entered only if nonmovant on notice that it must come forward with all its evidence); Osbakken, 931 F.2d at 37 (holding that purpose of ten-day period in Rule 56(c) is to provide nonmovant with opportunity to prepare defense to summary judgment). Thus, when a moving party advances in a reply new reasons and evidence in support of its motion for summary judgment, the nonmoving party should be granted an opportunity to respond. See Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d 404, 410 (1st Cir. 1985). However, if the district court grants summary judgment for the movant without relying on the new materials and arguments in the movant's reply brief, it does not abuse its discretion by precluding a surreply.

The issue is not jurisdictional. It is true that under Rule 56(c) a court lacks authority to enter summary judgment until ten days have run from the filing of the motion. But once that requirement has been met and the motion is at issue, the court does not lose jurisdiction simply because it accepts a reply brief from the movant. Rule 56(c) simply requires that if the court relies on new materials or arguments in a reply brief, it may not forbid the nonmovant from responding to these new materials. See id.

In this case, we are not convinced that the district court relied on any new materials or arguments contained in Seagate's reply brief. We need not resolve the issue definitively, however, because we conclude that the district court should not have granted summary judgment as to any of the appellants even on the basis of all the evidence and arguments before the court. Had the district court abused its discretion in refusing the appellants an opportunity to respond to any reply brief materials or argument, it would not affect our decision today.

III

Summary judgment should be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In reviewing the district court's decision to grant summary judgment, we view the evidence in the light most favorable to the nonmoving party. Kaul v. Stephan, 83 F.3d 1208, 1212 (10th Cir. 1996). The substantive law at issue determines which facts are material in a given case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id.

All eight appellants raise claims of age discrimination under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-634. We assess these claims under the burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). To make out a prima facie case of discriminatory discharge under the ADEA, a claimant affected by a RIF must prove: (1) that she is within the protected age group; (2) that she was doing satisfactory work; (3) that she was discharged despite the adequacy of her work; and (4) that there is some evidence the employer intended to discriminate against her in reaching its RIF decision. See Ingels v. Thiokol Corp., 42 F.3d 616, 621 (10th Cir.

1994). The fourth element may be established "through circumstantial evidence that the plaintiff was treated less favorably than younger employees during the [RIF]." Id.

Establishing a prima facie case of age discrimination under the ADEA creates a presumption of discriminatory intent that the defendant may rebut by asserting a facially nondiscriminatory reason for the employee's termination. Id. The plaintiff may then resist summary judgment if she can present evidence that that proffered reason was pretextual, "i.e. unworthy of belief," see Randle v. City of Aurora, 69 F.3d 441, 451 (10th Cir. 1995), or otherwise introduces evidence of illegal discriminatory motive, see id. at 453.[2]

Five of the plaintiffs -- Beaird, Bobo, Bush, Clark and Johnson-- also argue that their inclusion within the RIF was the product of intentional racial discrimination in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), and 42 U.S.C. § 1981. In addition, Beaird asserts that her discharge constituted gender discrimination in violation of Title VII. All these claims are assessed under the same McDonnell Douglas

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[2] The dissent takes extensive issue with this standard. Nonetheless, the Randle standard is well-established in this Circuit, and Randle itself provides a clear and reasoned refutation of the dissent's argument. Indeed, the dissent's Henson hypothetical, see Dissent at 5-6, illustrates how easy it is to fall into error once Randle's clear prescription is abandoned. According to the dissent, it would not be reasonable to allow Henson's case to proceed to a jury on a showing of pretext had Henson been the only employee of the nine terminated from his job code who was over 40 years old. But Seagate's treatment of other employees does not have the force that the dissent imagines. After all, Seagate may have instituted a RIF and fired the other eight employees pursuant to that RIF, both for legally valid reasons, and yet have decided to add Henson to that legitimate RIF list for entirely illegitimate reasons. Furthermore, Seagate's treatment of other employees cannot as a matter of law invalidate the otherwise reasonable inference that it discriminated against Henson. See Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579 (1978). At summary judgment, the lay-off of eight younger employees simply cannot explain away the legitimate inference of mendacity to be drawn from the fact that Seagate claimed Henson's firing was operationally necessary while at the same time hiring four other people to do the same job. ~ infra at 37. It may make discrimination a less likely cause of Henson's termination, but the dissent does not explain why it renders discrimination a legally impermissible conclusion.

order of proof. See Branson, 853 F.2d at 770 (ADEA and Title VII claims both subject to McDonnell Douglas indirect method of proof); Randle, 69 F.3d at 450 (assessing § 1981 claims under McDonnell Douglas framework).

A

The district court ruled that four of the plaintiffs -- Bobo, Bush, Clark and Henson -- failed to establish prima facie cases of age discrimination. The district court also ruled that three plaintiffs -- Bobo, Bush and Clark -- failed to establish prima facie cases of racial discrimination. There is no apparent dispute on appeal that these plaintiffs each established the first three elements of a prima facie case of race and age discrimination.[3] The district court appears to have based its decision on the fourth element -- that is, that none of these employees had shown Seagate treated them less favorably than their younger or nonminority counterparts. See Appellants' App. at 1082-84, 1093. We disagree. Although this circuit has not fully defined the fourth element of a prima facie case of discrimination in the context of a RIF, that element was more than satisfied as to each of these plaintiffs.

Our most complete statement of the fourth element to date is Branson, which holds: "Evidence that an employer fired qualified older employees but retained younger ones in similar positions is sufficient to create a rebuttable presumption of discriminatory intent ...." Branson, 853 F.2d at 771. We have not further described such evidence, thus leaving unanswered such questions as whether a single younger employee retained in a similar position is sufficient to establish the fourth element, or how similar a position must be in order to be relevant under Branson. To do so, we return to Branson's fundamental fourth-prong requirement that the

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[3] All four were members of the relevant protected groups. Bobo, Bush and Clark all scored threes on the CHAPA report, indicating their work met Seagate's requirements. Henson was given a rating of two on the CHAPA report indicating that his work nearly met requirements. Nevertheless, Henson insists that his work was satisfactory, see Appellants' App. at 897, which is sufficient to satisfy this element of the prima facie case, see MacDonald v. Eastern Wyo. Mental Health Ctr., 941 F.2d 1115, 1121 (lOth Cir. 1991). Finally, all four were discharged.

plaintiff introduce "evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." Id. (quoting Williams v. General Motors Corp., 656 F.2d 120, 129 (5th Cir. 1981)). To interpret this standard, we look in turn to the basic function of the plaintiff's prima facie case within the McDonnell Douglas order of proof, mindful that the burden-shifting framework "allows victims of age discrimination to prevail without presenting any evidence that age was a determining factor in the employer's motivation." La Montagne v. American Convenience Prods., Inc., 750 F.2d 1405, 1409-10 (7th Cir. 1984).

A prima facie case of discrimination is one sufficient to raise a presumption of intentional discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993). Left unanswered by the defendant, that presumption mandates a finding of intentional discrimination, see id., because a prima facie case "eliminates the most common nondiscriminatory reasons for the plaintiff's rejection," Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981), namely a "lack of qualifications or the absence of a vacancy in the job sought," International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977). More specifically, the second element of the McDonnell Douglas prima facie case -- that the plaintiff be "qualified," McDonnell Douglas, 411 U.S. at 802 -- and the fourth element -- that the "position remained open," id. -- perform this elimination role. "Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one." Teamsters, 431 U.S. at 358 n.44.

The prima facie case raises an inference of discrimination precisely because once the two most common nondiscriminatory reasons for an adverse employment decision are eliminated, that decision, "if otherwise unexplained, [is] more likely than not based on the consideration of impermissible factors." Burdine, 450 U.S. at 254 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)). Thus, the fourth element of Branson should be understood to parallel the fourth element of McDonnell Douglas by eliminating "lack of vacancy" as a legitimate nondiscriminatory motive for the employment decision. Once the first three elements have been satisfied, that elimination is all that is required to give rise to a prima facie case. See Branson, 853 F.2d at 771 n.5 (indicating no higher quantum of proof required to establish a prima facie case in RIF situation). The language used in Branson should not be understood to require a plaintiff to

produce evidence that age was a determining factor in the employer's motivation. Such an understanding would effectively fuse the prima facie and pretext steps of McDonnell Douglas and "obviate[] the central purpose behind the McDonnell Douglas method, which is to relieve the plaintiff of the burden of having to uncover what is very difficult to uncover --evidence of discriminatory intent." Oxman v. WLS-TV, 846 F.2d 448, 454-55 (7th Cir. 1988).

Of course, in a RIF case, the plaintiff cannot actually point to a continuing vacancy because her position has been eliminated. She can, however, point to circumstances that show that the employer could have retained her, but chose instead to retain a younger employee.[4] In such circumstances, "lack of vacancy" cannot explain the contested employment decision because the employer prefers to retain a younger employee in a position for which the plaintiff is qualified. Even though certain exigencies of RIF cases may explain the employer's action in such circumstances, "these exigencies are best analyzed at the stage where the employer puts on evidence of a nondiscriminatory reason for the discharge." Branson, 853 F.2d at 771.

For instance, a plaintiff who is fired pursuant to a RIF and who held a similar position to a younger retained employee can satisfy the fourth element. See Krause v. Dresser Indus., Inc., 910 F.2d 674, 677 (10th Cir. 1990) (holding that prima facie case established where employer fires fifty-two year old accountant pursuant to RIF, but retains one younger employee in similar position); Herold v. Hajoca Corp., 864 F.2d 317, 320 (4th Cir. 1988); Branson, 853 F.2d at 771 ("Evidence that an employer

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[4] The younger employee need not be outside the ADEA-protected class. See O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307, 1310 (1996). But the younger employee cannot be insignificantly younger because evidence that such an employee was retained would be insufficient to create an inference of illegal discrimination. Id. For purposes of convenience, we refer to "younger" employees where we mean "not insignificantly younger" employees.

Of course, with reference to prima facie cases of race and gender discrimination, the plaintiff need only point to members of the opposite sex or of different races. Again, for purposes of convenience, our analysis of a plaintiff's prima facie case in the RIF context addresses ADEA claims -- but it is entirely applicable to gender- and race-based claims as well.

fired qualified older employees but retained younger ones in similar positions is sufficient to create a rebuttable presumption of discriminatory intent and to require the employer to articulate reasons for its decision."). The company's decision to reduce its workforce does not in itself legitimate the employer's choice to fire the employee from the protected class rather than the younger employee. "Lack of vacancy" is thereby eliminated as a nondiscriminatory explanation for that plaintiff's dismissal and, assuming the first three elements are met, a prima facie case has been shown.[5]

Here, the evidence in the record establishes that for each of the four plaintiffs noted above, at least one younger and/or nonminority employee was retained in the same job code. For example, in job code 1433, to which Bobo, Bush and Clark all belonged, Terry Smith, a white thirty-seven year-old employee was retained. See Appellants' App. at 172-73. In job code 276X, to which Henson belonged, numerous younger employees were retained. See id. at 208-09. Under Rule 56(c), a movant for summary judgment has the burden of "pointing out to the district court . . . [the] absence of evidence to support the nonmoving party's case." See Celotex, 477 U.S. at 325. With regard to the prima facie case, the movant in this case was unable to carry its burden.

B

Seagate advances the RIF and its implementing criteria as a facially nondiscriminatory reason for its decision to lay off the plaintiffs. The company has therefore met its burden under the second step of McDonnell Douglas. See Furr v. Seagate Technology, Inc., 82 F.2d 980, 985 (10th Cir. 1996), cert. denied, 117 S. Ct. 684 (1997). In a RIF case, a plaintiff can demonstrate pretext in three principal ways.[6]

First, she can argue that her own termination does not accord with the RIF criteria supposedly employed. In this case, certain appellants

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[5] The fired employee can make a prima facie case without showing she is as or more qualified than employees who are retained. To the extent the district court suggested otherwise, see Appellants' App. at 1093, it was in error. See Branson, 853 F.2d at 771 n.6.

[6] We do not foreclose other methods of demonstrating pretext. Most plaintiffs' arguments, however, will fit within the typology discussed below.

contend that had employee potential been considered according to the employer's own RIF formula, they would have been retained. This kind of evidence can in some cases suffice to substantiate pretext. See Christie v. Foremost Ins. Co., 785 F.2d 584, 586-87 (7th Cir. 1986) (holding that failure of defendant to comply with its own RIF policy allowed jury to conclude RIF was pretextual). But minor inconsistencies in the application of RIF criteria may be too insubstantial to allow a reasonable jury to infer that the RIF was pretextual. See Lucas v. Dover Corp., 857 F.2d 1397, 1402 (10th Cir. 1988).

Second, a plaintiff can adduce evidence that her evaluation under the defendant's RIF criteria was deliberately falsified or manipulated so as to effect her termination or otherwise adversely alter her employment status. See, e.g., Gustovich v. AT & T Communications, Inc., 972 F.2d 845, 848 (7th Cir. 1992) ("To make progress, the plaintiffs had to come up with evidence implying that the performance evaluations had been 'cooked' in order to do in the older workers."). All the appellants in this case make claims of this kind. One method of demonstrating manipulation or falsification of evaluation is to produce evidence that a supervisor responsible for assessing her performance displayed ageist animus .

Third, a plaintiff can adduce evidence that the RIF is more generally pretextual. For instance, a plaintiff may establish that an employer actively sought to replace a number of RIF-terminated employees with new hires. Bush, Bobo and Henson all bring claims of this nature. Statistical evidence may, in certain circumstances, be relevant to this purpose. See Fallis v. Kerr-McGee Corp., 944 F.2d 743, 746 (10th Cir. 1991). Contrary to defendant's argument, however, statistical evidence cannot defeat the pretext claim of an individual plaintiff where the plaintiff's case rests on non-statistical evidence. "A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination." Furnco, 438 U.S. at 579.

1. Ruth Noran

Noran is the only appellant fired from job code 1432. Seagate claims that she was fired pursuant to operational requirements that dictated the lay-off of ten employees from that job code. As the only employee from this job code with a score of two on the CHAPA report, she was selected first for termination.

There are two pieces of evidence in the record that together support a finding of pretext in this case: (1) plaintiffs' Exhibit-53; and (2) a final performance evaluation dated April 19, 1993. Exhibit 53, submitted by plaintiffs in response to Seagate's motion for summary judgment, is an undated document headed "Employees Identified for RIF Using Statewide Pooling." For Noran's job code, it lists eleven employees ranked in ascending order according to their performance points evaluation. Noran is listed third, with a total of 240 points. See Appellants' App. at 795.

Of the eleven listed, only four were in fact laid off. According to Seagate, the evaluations listed in Exhibit 53 were irrelevant because the final performance criterion selected for purposes of the RIF was performance grade rather than performance points. Additionally, Seagate claims that Noran's case was appropriately dismissed because, by the time final RIF decisions were made, Noran's performance rating listed in Exhibit 53 had been replaced by a later and lower review, which scored Noran at 180 points for a CHAPA performance grade of two.

Noran cannot defeat summary judgment by claiming that she would have been retained if different RIF criteria had been used. Seagate may choose to conduct its RIF according to its preferred criteria of performance--that is, performance grade as opposed to performance points--and we will not disturb that exercise of defendant's business judgment. See Doan v. Seagate Technology, Inc., 82 F.3d 974, 978 (10th Cir. 1996), cert. denied, 117 S. Ct. 684 (1997). That is so even if it appears to Noran that the points scale would have represented a better tool of performance evaluation. The ADEA does not require Seagate's business decisions to be wise--just nondiscriminatory. See Lucas, 857 F.2d at 1403.

But this principle does not immunize all potential "business judgments" from judicial review for illegal discrimination. See Sanchez v. Philip Morris Inc 992 F.2d 244, 247 (10th Cir. 1993) (when employer invokes business judgment rule in discrimination context, "[t]he reality of the entire situation must be examined"). Such a doctrine would defeat the entire purpose of the ADEA. See Montana, 869 F.2d at 106; Graefenhain v. Pabst Brewing Co., 827 F.2d 13, 21 & n.8 (7th Cir. 1987), overruled on other grounds by Coston v. Plitt Theaters, Inc., 860 F.2d 834 (7th Cir. 1988). There may be circumstances in which a claimed business judgment is so idiosyncratic or questionable that a factfinder could reasonably find that it is a pretext for illegal discrimination. See Sanchez, 992 F.2d at 247;

Thornbrough v. Columbus & Greenville R.R., 760 F.2d 633, 647 (5th Cir. 1985), overruled on other grounds by Hicks, 509 U.S. 502; Loeb v. Textron, Inc., 600 F.2d 1003, 1012 n.6 (lst Cir. 1979). Without more, however, the choice of performance grade over points cannot reasonably be thought to evidence pretext. There is simply no inference of foul play about that choice.

But Noran does more than question that choice. She argues further that Exhibit 53 shows that Seagate improperly manipulated her final CHAPA performance evaluation, which gave her 180 points for a two rating, in order to ensure her termination. Under the RIF criteria, had Noran's 240 point score stood unaltered, she would have had a CHAPA score of three and been retained. Of course, Noran cannot establish pretext by demonstrating the mere opportunity for manipulation. To allow her to do so would effectively--and incorrectly--require a defendant to prove nondiscrimination. Here, however, Noran has produced further evidence that raises the necessary inference of manipulation.

The record contains a final performance evaluation of Noran dated April 19, 1993. See Appellants' App. at 265. But she did not receive its results until July 26, 1993, see id. at 172, 895, three days after Seagate had conclusively decided to terminate her, see id. at 775. Even that might only point to the opportunity for employer misconduct but for the fact that the relevant portion of Exhibit 53, which lists her as having 240 points, was evidently compiled on or after June 28, 1993. See id. at 172, 795 (showing that Exhibit 53 contains point scores for Owens, Lashley and McCartney, all of which are dated June 28, 1993, on the CHAPA table). In other words, more than two months after Seagate claims to have completed the 180-point/grade-two performance evaluation that ostensibly led to Noran's termination, the company was describing her on internal documents as having 240 points. That latter score would have resulted in a grade three CHAPA ranking and Noran's retention. One legitimate inference is that Seagate resolved to alter the score for Noran's April evaluation after June 28, 1993. That legitimate inference of purposeful manipulation is sufficient

to permit a jury to find pretext.[7] Thus, there are genuine issues of material fact that preclude the entry of summary judgment against Noran.

2. Rosa Clark

Clark is one of four appellants fired from job code 1433. Seagate claims that operational requirements called for fifteen lay-offs in this job code. Clark received a performance grade of three on the CHAPA report. Because no employee in her job code scored lower, Seagate identified those to be laid off in reverse order of seniority. With 22.77 years of credited seniority, Clark was terminated as the tenth most junior employee with a three rating.

Clark attempts to rely on Exhibit 53, which indicates that she would have been retained had Seagate chosen to rely on points alone to identify lay-offs.[8] As noted above, we agree with Seagate that its choice of performance criteria cannot properly evidence pretext.

Nor is Clark's opinion that discrimination was pervasive at Seagate sufficient to establish pretext. Without specific examples of such discrimination, Clark's views are "mere conjecture" and, thus, an insufficient basis on which to deny summary judgment. See Branson, 853 F.2d at 772. From the record before us, the instances of claimed discrimination that she does describe, such as her mistreatment by a

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[7] The dissent's alterative inference--that "Exhibit 53 contains mistakes and inconsistencies that any preliminary document would contain when a business is attempting to compile large amounts of data on its workforce," Dissent at 11--is certainly permissible, but it is not our role to chose among reasonable inferences. See Brown v. Parker-Hannifin Corp., 746 F.2d 1407, 1411 (10th Cir. 1984) ("Where different ultimate inferences may be drawn from the evidence presented by the parties, the case is not one for summary judgment."). Nowhere does the dissent explain why an inference of purposeful manipulation is per se unreasonable.

[8] She also notes that certain employees within her job code were retained despite having lower point scores. Michelle Tucci, for instance, was a younger, white employee in job code 1433, who was retained despite having only 270 points--30 points fewer than Clark--on her final appraisal. See Appellants' App. at 173.

supervisor, can only be speculatively attributed to discriminatory animus, and "speculation . . . will not suffice for evidence." Doan, 82 F.3d at 977.

Clark's final argument for pretext is based on a comparison between herself and Mary McCartney, a white employee retained in job code 1432. Had the two employees been in the same job code, McCartney would have been laid-off before Clark because she scored a three in her final performance evaluation and was the less senior of the two. Seagate argues that comparisons across job codes are not probative of pretext because employees in different codes are not similarly situated. The company insists that it is the plaintiffs' obligation to show that Seagate's pooling of employees into job codes for purposes of the RIF was not justified.

Seagate is not entirely correct. When an employer's RIF criteria include job categorization, an employer must explain the basis for that categorization or risk a finding of pretext. Cf. Bell v. AT & T, 946 F.2d 1507, 1511 (10th Cir. 1991) (recognizing that where employer decides to limit RIF to certain groups, it is incumbent on employer to explain reason for that limitation). "Otherwise, a sophisticated employer could immunize itself from liability by placing a minority employee in a group with employees with greater seniority while banding all other employees with less seniority in another group not at risk of termination. In that situation, it is not the process of ranking within the groups that is suspect, but instead the formation of the groups itself." Id. The same principle logically extends to the present instance in which the employer pooled employees into job codes and then determined the number of lay-offs to be made in each job code before identifying the employees to be let go.

Seagate has proffered a reason for its categorization. Operational requirements dictated that the company reduce the number of employees performing certain job functions. Thus, Seagate claims, employees were categorized according to job codes in which every employee "performed essentially the same set of tasks." See Appellants' App. at 315. Seagate having offered that reason, it becomes plaintiffs' burden to show that comparisons across job codes are to similarly-situated individuals. See Furr, 82 F.3d at 988; Doan, 82 F.3d at 979. To do so, plaintiffs must show that they "essentially did the same type of work" as the employees they point to for purposes of comparison. See Fallis, 944 F.2d at 745. That

showing would demonstrate that the employer's categorization by job code was pretextual.

To meet this burden, Clark suggests that Seagate itself admitted the legitimacy of her comparison to McCartney. In its CHAPA report, Seagate lists McCartney's job code, 1432, as "Shpg/Rec Str Clk A," see Appellant's App. at 172, and Clark's job code, 1433, as "Shpg/Rec Str Clk Sr," id. Appellants argue this shows that job code 1432 consists of higher job grades[9] of the same job classification, and that both codes contain employees "performing the same duties." Appellants' Reply Br. at 17; see Appellants' App. at 441. That may be the case but we doubt that the mere similarity of job title is sufficient grounds to conclude that differential treatment of the two groups is pretextual. Cf. Fallis, 944 F.2d at 745 (to establish pretext, plaintiff geologist has burden to show that younger geologists held to lower standard had same "duties or responsibilities"). Likewise, the mere assertion, without any evidentiary support, that employees in the two codes performed the same tasks is insufficient to defeat summary judgment. See Fed. R. Civ. P. 56(e).

Clark also points to an internal Seagate memo about the RIF from Human Resources which notes: "The potential exists that within several grades of employees that have like skill sets, longer service employees may be released and lesser service employees, lesser grades, and lesser skills could be retained." See Appellants' App. at 581. Like the similarity of job title, this is certainly suggestive of pretext, but is insufficient without more to establish the separation of job codes 1432 and 1433 as pretextual. First, there is no indication that the above statement refers to those codes. Second, even if it does, the separation of employees with the same "skill sets" does not indicate that the separated groups perform the same functions. It may indicate that one set of employees can do the other's jobs, but not that it actually does so. Appellants may believe that Seagate's job coding should be by job qualification, not function performed, but it is not our place to disturb that kind of business judgment.

However, the evidence submitted by Clark does not stand alone. Critically, Jerlene Bush and Mildred Bobo, both within job code 1433,

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[9] Job grades are entirely distinct from performance grades. The former refers to an employee's positional rank within a given job grouping; the latter to an assessment of their job capabilities.

testified that at the time of the RIF, they trained two employees, Carolyn Muse and James Russell Hunter, who then replaced them in their positions. See Appellants' App. at 49698. Yet Hunter was placed in job code 1432, see id. at 171, and Muse in 1402, see id. at 170.[10] Muse's placement in another job code generally raises questions about the claimed functional differences between job codes. But Hunter was placed into the very job code that plaintiffs argue was pretextually separated from their own code for purposes of discrimination. On the basis of personal observation, two witnesses from job code 1433 testified that they trained someone to perform their jobs and that the person they trained was placed in job code 1432. That is sufficient for a reasonable jury to find Seagate's differentiation of the two codes pretextual.

As a consequence, McCartney's retention creates a genuine issue of material fact sufficient to preclude the entry of summary judgment against Clerk's claim of race discrimination. However, Seagate correctly observes that Clark's comparison to McCartney cannot support a claim of age discrimination because McCartney was 66 years old at the time of the RIF, fifteen years older than Clark. But, having established a sufficient basis to find the differentiation of job codes 1433 and 1432 pretextual, Clark can substantiate her claim of age discrimination by pointing to any retained employee in job code 1432 who is younger than she, less senior, and rated as a three on the CHAPA report. There is no shortage of such employees. See Appellants' App. at 170-72. Thus, there are genuine issues of material fact that preclude the entry of summary judgment against Clerk's claim of age discrimination.

3. Mildred Bobo. Jerlene Bush and Claudia Johnson

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[10] Bush and Bobo's testimony does not clearly identify Hunter as one of the two trainees. They both referred to a "Russell Hawna." See Appellants' App. at 497. "Hawna," however, was not their spelling, but is simply the transcription made by the reporter; in fact, they were not asked by counsel to spell the name of the person they identified. Despite this apparent confusion, the district court, see Appellants' App. at 1083, and Seagate, see id. at 1006, have both characterized the testimony as referring to the James Russell Hunter placed in job code 1432, and appellants do not challenge this characterization on appeal. We see no reason not to follow the unanimous characterization of this evidence.

Like Clark, these three plaintiffs were all selected for termination from job code 1433, all of them scored three on the CHAPA report, and all three can legitimately establish age and race discrimination by pointing to younger, white employees retained in job code 1432. Like Clerk's, therefore, their claims present genuine issues of material fact sufficient to preclude the entry of summary judgment against them.

In addition, Johnson establishes pretext by raising the inference that her final CHAPA score, which is dated June 28, 1993, see Appellants' App. at 173, may have been manipulated. Plaintiffs submitted a number of"Employee Evaluations," see id. at 631-764, including one for Johnson that is dated July 13, 1993, which is after the claimed date of her final CHAPA evaluation, id. at 631. This document lists Johnson's "Last Performance Rating," dating from December 28, 1992, as a four, and states that Johnson has since "continued to perform at the same rating level." Id. The discrepancy is startling, and not only to us.[11] More than two weeks after the performance evaluation on which Seagate claims to have based its lay-off of Johnson, the company was describing her as continuing to perform at a four rating. Johnson's submission raises the necessary inference of pretext, and her claims therefore survive Seagate's motion for summary judgment.[12]

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[11] In an internal Seagate memo dated July 23, 1993, the Human Resources Department notes its concerns that certain "Employee Evaluation[s]" of projected change in performance and potential--presumably a reference to the "Employee Evaluations" submitted in Appellants' App. at 631-764, which project changes in performance and potential ratings--may not agree with the "July 26 appraisals"--presumably a reference to the final CHAPA report ratings, many of which are dated July 26, 1997. See Appellants' App. at 590. The memo asks: "Should the employee evaluation agree with the July 26 appraisal?" Next to this question, someone has written: "Yes--why wouldn't it?" Id. That response, which appears to have been written by someone at Seagate, compare Appellants' App. at 590 with id. at 582 (demonstrating that other such annotations are incorporated into later drafts of the same document), does nothing to alleviate the suspicion of mendacity raised by Johnson.

[12] In its reply brief, Seagate attempts to explain this discrepancy. Even assuming that such explanation is properly before us, it cannot be dispositive of Johnson's claim. Seagate argues that Johnson's Employee Evaluation confirms her 3 rating. That is one possible interpretation of the document. But

4. Maudie Beaird

Beaird was in job code 9104, from which fifteen employees were terminated, ostensibly pursuant to operational requirements. Only one employee in this code scored a two on the CHAPA report, and Beaird was therefore terminated as the thirteenth most junior 9104 employee to have a CHAPA score of three. See Appellants' App. at 203.

Most of Beaird's arguments for pretext are plainly without merit. For instance, she contends that her final and controlling performance appraisal was carried out by a supervisor who had discriminated against her in 1990. However, the record contains little to suggest discrimination was involved in the 1990 incident. The only evidence Beaird has in support of this claim is that the Human Resources department responded adequately to her complaints in 1990; but that does not mean the department determined discrimination was involved.

Beaird does point out the anomaly between Exhibit 53, which, for her job code, lists Eugene Fischer for termination with a score of three, see Appellants' app. at 796, and the CHAPA report, which rates Fischer as a four, see id. at 203, and therefore determines his retention. That anomaly does not itself suggest pretext. Seagate claims to have used the latest available performance appraisals for RIF purposes, which means that final lay-offs may differ from those listed in Exhibit 53 without evidencing pretext. But Seagate's position does not fully explain Fischer's retention. His CHAPA rating of four is dated November 2, 1992. See id. Exhibit 53, which gives his rating as a three, was evidently compiled well after that date because it contains a three rating for Walter Johnson, which the CHAPA report dates from June 28, 1993. See id. at 203, 796.

The anomaly therefore raises the inference that Fischer's latest, Exhibit 53-listed score was ignored in favor of a preexisting four-rating, thus preventing his lay-off. That the stated reason for Fischer's retention may have been pretextual does not mean, however, that Beaird's lay-off from the same job code is also suspect. Certainly, an employer's failure to

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drawing all inferences in favor of the non-movant, as we are required to do, we cannot discount Johnson's proposed interpretation.

apply objective RIF criteria to a third party may sometimes establish that that employer was not guided by the RIF criteria in an individual plaintiff's case. Pointing to a third party could show pretext if, for instance, the RIF involved a small number of people or if there are a substantial number of third parties to whom the plaintiff can point. But where, as here, a plaintiff identifies only one third party from the relevant pool of 30 employees, she fails to put forth sufficient evidence that the employer's nondiscriminatory reason in her specific case is "unworthy of belief." Randle, 69 F.3d at 451. Beaird's claim is at best "colorable" and therefore does not survive summary judgment. See Anderson, 477 U.S. at 249-50.

5 . Margaret Jones

Jones was employed in job code 1032, from which a total of 116 employees were laid off by Seagate to meet operational requirements. Jones scored a three on the CHAPA report; others with that score were retained, but all had worked for Seagate for a longer period of time. Aside from pointing to retained employees with lower point scores, which, as we have noted, does not establish pretext, Jones makes two arguments in support of her claim.

First, she points to Seagate's selective use of potential as a RIF criterion. Seagate claims to have followed the RIF criteria listed in its employee handbook, see Appellants' App. at 219, which states unequivocally that, for RIF purposes, Seagate will take into account "operational requirements, performance and potential. Where these factors are equal, length of service will be taken into account." Id. at 321. Yet, in identifying employees to be laid off in job code 1032, Seagate first utilized the criteria of operational requirements and performance. If those two were equal, they looked to seniority as a tie-breaker without considering potential. See id. at 323. Thus, their selection method deviated from their stated policy. That deviation disadvantaged Jones because, as a three-performer with potential, see id. at 632, she would not have been laid-off if Seagate had used potential to rank those in her job code who also scored three on the final CHAPA listings.

Other things being equal, that deviation might evidence pretext. Here, however, it appears that Seagate effectively abandoned its stated policy of considering potential. See id. at 220-21. If uniformly applied, that shift in policy would not evidence pretext because no employer is required

to follow its previously stated policies. See Jones v. Unisys Corp., 54 F.3d 624, 632 (10th Cir. 1995). But, Seagate did not abandon potential altogether. There is material in the record indicating that, in some job codes, potential was factored into the RIF decision. See Appellants' App. at 775-79. Moreover, on at least a number of occasions, potential was used where a manager could document the greater potential of a less senior employee. See id. at 776. That raises an inference, albeit not a strong one, that potential was used selectively to benefit younger employees. Cf. Mohammed v. Callaway, 698 F.2d 395, 399 (10th Cir. 1983) ("disturbing procedural irregularities" may evidence pretext). Accordingly, Seagate's decision to ignore Jones's recorded potential constitutes limited evidence of pretext.

Jones's second argument is based on a one-page, hand-written submission dated July 28, 1993, and headed "Rating Deviations," which lists Jones as going from a performance grade of four, which would have resulted in her retention, to a grade of three, which did result in her termination. See id. at 627. Because the CHAPA report lists her last three evaluations as threes (or the point equivalent thereof), see id. at 167, this document raises the inference that Jones achieved a four rating that was suppressed for purposes of including her in the RIF.[13]

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[13] The inference is strengthened by a series of notes apparently prepared by Seagate management. See id. at 780-87. The notes, written in a Seagate "Business Diary," id. at 780, state that:

> [t]he people who are affected by the RIF will not get a perf. app. They will get the forecasted merit--which was planned in July. This is being done to keep managers from deviating from the forecasted perf rating & changing the merit amount.

Id. at 783. One implication of this note is that Seagate was concerned that an employee's CHAPA-listed performance rating might deviate from the performance rating projected by an earlier "Employee Evaluation." Any such deviation might raise an inference of deliberate rating manipulation, as occurred in Johnson's case. See supra Section III.B.3. The note suggests that the solution to this potential problem was to ensure that employees to be terminated "get the forecasted merit" contained in their "Employee Evaluation," thus eliminating the potential for any deviation between their projected and final performance evaluation. That reading of the note would

None of this evidence, when considered separately, provides a clear indication of pretext. However, we are required to consider the totality of such circumstantial evidence, see Hidalgo v. Overseas Condado Ins. Agencies, Inc., 120 F.3d 328, 338 (lst Cir. 1997); Graefenhain, 827 F.2d at 19, and that does question Seagate's proffered explanation for Jones's termination. Jones can therefore substantiate her claims sufficiently to survive summary judgment. Finally, there remains the question, unaddressed by the district court, of whether Jones's claims are timely. The defendant objects that Jones's claims are barred because they were filed with the Equal Employment Opportunity Commission ("EEOC") more than 300 days after Seagate notified her that she was to be included in the RIF. See 29 U.S.C. §§ 626(d)(2) & 633(b); see also Aronson v. Gressley, 961 F.2d 907, 911 (10th Cir. 1992) ("A timely filing with the EEOC is a prerequisite to a civil suit under . . . the ADEA."); Hulsey v. Kmart, Inc., 43 F.3d 555, 557 (10th Cir. 1994) (ADEA claims accrue on date employee notified of adverse employment action); Appellant's App. at 145 (Jones notified on August 2, 1993, that she would be terminated under RIF); id. at 133 (Jones's charge to EEOC, dated July 19, 1994).

We agree that Jones's claims were not filed within the stated period, but that does not necessarily mean they are time-barred. Because the timely filing of a discrimination charge with the EEOC is not a jurisdictional prerequisite to a suit in federal court, it is best likened to a statute of limitations and is therefore subject to waiver, estoppel and equitable tolling. Richardson v. Frank, 975 F.2d 1433, 1435 (10th Cir. 1991). The trial court made no discernible ruling on these equitable issues. We are therefore reluctant to affirm summary judgment given that no apparent evidentiary hearing was held below to determine their potential application to Jones's case. See Wilkerson v. Siegfried Ins. Agency, Inc., 621 F.2d 1042, 1045 (10th Cir. 1980); see also Delmar v. Raytheon Aircraft Corp., No. 96-1002-JTM, 1996 WL 499144, at *7 (D. Kan. Aug. 9, 1996) (denying summary judgment to employer because Tenth Circuit

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then explain the "Ratings Deviation" listing as consisting of employees whose final ratings initially differed from those projected. Jones's being listed as a "4 to 3" would fit this pattern because her "Employee Evaluation" had projected a three rating. See id. at 632. The only other employee placed on the "Ratings Deviation" list for whom the record contains an Employee Evaluation is Sandra Moore. She also fits this pattern. Listed as a "4 to 3" on the Ratings Deviation, she had been projected to earn a three on her "Employee Evaluation." See id. at 627, 638.

cases "indicate a detailed factual inquiry is necessary to determine whether equitable tolling should be applied," requiring "[i]n all likelihood, an evidentiary hearing"). Consequently, we vacate the grant of summary judgment to Seagate on Jones's ADEA claim, and remand to the district court to determine, in the exercise of its equitable discretion, whether Jones's claims should be heard.

6. William Henson

Henson was employed in job code 276X. Nine employees were terminated from this section because of alleged operational requirements. As the only 276X employee to have scored a two on the CHAPA report, Henson was the first to be terminated.

Henson testified that prior to the lay-off and "during the time we got our lay-off notice," Seagate was advertising open positions within his job code. See Appellants' App. at 519. That claim is borne out by the record. See id. at 578 (open position in Henson's job code that was posted on June 28, 1993, still open on July 28, 1993); id. at 857-60 (August 1993 postings of at least three open positions in Henson's job code and grade). A factfinder could therefore legitimately conclude that Seagate was hiring into positions similar to Henson's at the very time it claimed the elimination of positions such as Henson's was operationally required. That conclusion is certainly sufficient to support a finding of pretext. Defendant's reliance on Furr, 82 F.2d at 985-86, and the district court's on Fallis, 944 F.2d at 745 n.2, are misplaced. In both those cases, there was no evidence that the employer was hiring into similar positions at the same time that it discharged the plaintiff. Thus, as to job code 276X, Henson presents sufficient evidence of the pretextual nature of the RIF to defeat summary judgment.[14]

IV

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[14] Seagate argues that Henson could not have obtained any of these positions because of his two rating. But it is the very existence of those jobs, regardless of Henson's ability or odds of acquiring them, that questions Seagate's ostensible reason for laying off employees from job code 276X. Put bluntly, it is hard to argue convincingly that simultaneous elimination of and hiring for similarly-situated positions is operationally required.

All of the appellants have presented claims of wrongful discharge in violation of Oklahoma's public policy against discrimination. The district court granted summary judgment to Seagate on appellants' state law claims because it held that no state claim could lie on facts that did not also support a federal claim. Given our holding that the federal claims are generally sufficient to survive defendant's motion for summary judgment, we cannot, for the most part, affirm summary judgment as to the state claims unless a separate basis to do so exists under state law. It does.

Appellants' age-based claims are barred because they are based on their status rather than their actions, and because the ADEA provides an adequate remedy for the discrimination charged. See List v. Anchor Paint Mfg. Co., 910 P.2d 1011, 1014-15 (Okla. 1996).

Beaird's gender-based state claims also fail. Although an earlier case had allowed public policy suits for racial discrimination because of the relative inadequacy of Title VII remedies, see Tate v. Browning-Ferris, Inc., 833 P.2d 1218, 1223 (Okla. 1992), the Supreme Court of Oklahoma has held that post-Tate amendments to Title VII have rendered the statute adequately remedial, thus barring suits for wrongful termination in violation of Oklahoma's public policy against gender discrimination. See Marshall v. OK Rental & Leasing, Inc., 939 P.2d 1116, 1122 (Okla. 1997).

In light of List and Marshall, appellants' race-based claims must also fail. The post-Tate Title VII amendments similarly improve the remedies available for race-based claims, and Marshall must therefore bar suits for wrongful termination in violation of state public policy against racial discrimination. Cf. Cassel v. Webco Indus., Inc., 942 F. Supp. 1409, 1412 (N.D. Okla. 1996) ("[List's] analysis applies equally to wrongful discharge cases that could be brought pursuant to Title VII, because the remedies available under Title VII are identical to those afforded by the ADEA.").

V

All the appellants, with the exception of Beaird, present sufficient evidence of pretext to establish genuine issues of material fact precluding the entry of summary judgment against their federal claims of discrimination. With regard to Beaird, the district court's grant of summary

judgment to Seagate is AFFIRMED. With regard to the other appellants, the district court's grant of summary judgment is REVERSED as to all federal claims of discrimination, save for the claim of age discrimination brought by appellant Jones, as to which we VACATE and REMAND for further proceedings consonant with the views herein expressed. The district court's grant of summary judgment to Seagate is AFFIRMED as to all state claims.

96-6087, Beaird v. Seagate Technology, Inc. TACHA, J., concurring in part and dissenting in part.

I concur in the judgment, except with respect to plaintiff Ruth Noran. I write separately to express my view that this Circuit's treatment of pretext evidence has inappropriately circumscribed district courts' powers under Rule 56 of the Federal Rules of Civil Procedure.[15]

In a discrimination suit, once a plaintiff has made a prima facie showing of discrimination and the defendant has rebutted the presumption created by that showing with a legitimate, nondiscriminatory reason for the employment decision, this Circuit has held (as the majority does today) that if the plaintiff employee then advances evidence that the defendant's alleged nondiscriminatory reasons are pretextual (i.e. unworthy of belief), the defendant employer cannot succeed at the summary judgment stage. See Ingels v. Thiokol Corp., 42 F.3d 616, 622 (10th Cir. 1994). I believe the proposition that an employer can never succeed at summary judgment upon a plaintiff's showing of pretext is inconsistent with Rule 56 and is not, as we have presumed, dictated by Supreme Court precedent.

It is my conclusion that to defeat summary judgment in an employment discrimination suit, a plaintiff must present evidence that (1) creates a genuine issue of material fact as to whether the employer's stated reason was not actually what motivated the employer *and* (2) from which

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[15] The standards for a summary judgment motion under Rule 56 are the same as a Rule 50 motion for judgment as a matter of law at the conclusion of trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251 (1986). Some of the circuits that have held as I propose here have articulated their rule upon review of a Rule 50 motion. See, e.g., Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 994 (5th Cir. 1996) (en banc). For the sake of brevity, I refer only to Rule 56.

a reasonable juror could infer that unlawful discrimination was a determinative factor in the plaintiff's termination. See Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 994 (Sth Cir. 1996) (en banc); Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F.3d 436, 440-441 (11th Cir. 1996) (per curiam), cert. denied, 117 S. Ct. 2511 (1997); Woods v. Friction Materials, Inc., 30 F.3d 255, 260 n.3 (lst Cir. 1994); but see Sheridan v. DuPont, 100 F.3d 1061, 1067 (3d Cir. 1996). Not only must the plaintiff produce evidence of pretext, but the pretextual evidence must be of a nature or quality from which a reasonable jury could infer illegal discrimination. This is a legal determination required by Rule 56.

Randle v. City of Aurora, 69 F.3d 441 (10th Cir. 1995), is the case in which we most completely articulated the rule that a district court must always deny an employer's motion for summary judgment upon the plaintiff's showing of pretext. Id. at 451-53. In that case, we were faced with the question whether a plaintiff asserting employment discrimination "must come forward with some direct evidence that the [employer] was motivated by an illegal discriminatory animus" in order to survive summary judgment. Id. at 451. Such a requirement has been termed the pretext-plus approach. See Marx v. Schnuck Markets, 76 F.3d 324, 328 (10th Cir. 1996). In Randle, we concluded that a plaintiff does not need to produce direct evidence of discrimination to survive summary judgment. I am in full agreement with that conclusion and this Circuit's rejection of the pretext-plus approach. The federal discrimination statutes do not require a plaintiff to provide direct evidence of illegal discrimination. Direct evidence is "[e]vidence, which if believed, proves [the] existence of [a] fact in issue without inference or presumption." BLACK'S LAW DICTIONARY 316 (abr. 6th ed. 1991). Our rejection of the pretext-plus standard, however, should only be read as a rejection of the requirement that a plaintiff must produce such direct evidence of discrimination. Rejection of the pretext-plus standard does not and should not relieve a plaintiff of the burden of proffering evidence that is in some regard probative of the defendant's alleged discriminatory motive. Yet, that is exactly what the language of Randle and other cases in this Circuit have done. Although we should not require direct evidence of discrimination, we should always require good evidence--evidence from which a reasonable juror could infer illegal discrimination--for a plaintiff to be able to prevail.

The question I raise here, then, is whether a plaintiff who has presented evidence from which a court could conclude that an employer's

proffered nondiscriminatory reason is pretextual (i.e., unworthy of belief) has necessarily established pretext upon which a jury could infer discriminatory motive. I think the answer to the question is clearly no. We have never addressed this question squarely, even though the language of our cases seems to preclude such an approach. See, e.g., Randle, 69 F.3d at 452 n.17, 453; Ingels, 42 F.3d at 622. We would not place an excessive or impermissible burden on plaintiffs by requiring pretext evidence to be of such a nature or quality that a reasonable jury could infer discriminatory conduct. Indeed, in considering a summary judgment motion, the court must view the evidence and inferences in the light most favorable to the employee-plaintiff. See Zimmerman v. First Fed. Sav. & Loan Ass'n, 848 F.2d 1047, 1051 (10th Cir. 1988).

For a case to proceed beyond the summary judgment stage, there must be a genuine issue as to any material fact." F.R.C.P. 56(c). If a plaintiff's evidence of pretext is not legally sufficient to support any inference of illegal discrimination, there is no genuine issue of any material fact, and the case should not go to the jury. Cf. Conaway v. Smith, 853 F.2d 789, 794 (10th Cir. 1988) ("Because no reasonable inference of a property or liberty interest can be drawn from [the] complaint and supplemental evidence, summary judgment is appropriate as to the due process claims."). If, on the other hand, the plaintiff's evidence of pretext does support an inference of discrimination, there is a genuine issue of material fact and the court must send the case to the jury. The factfinder's role is not compromised in any regard.

In an employment discrimination suit, the factfinder's task is to determine whether an employer was motivated by discriminatory animus, but the factfinder can only consider the evidence if the evidence is legally sufficient to support such a finding of discrimination. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986) (holding that "the inquiry . . . [at summary judgment is] whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law"). The rule in this Circuit, however, is that an employment discrimination suit will always go to the jury so long as the evidence is sufficient to allow the jury to disbelieve the employer's proffered reason for the employment action. See Randle, 69 F.3d at 451 n.15. This per se rule precludes a district court from engaging in a separate inquiry into whether that evidence is legally sufficient to support a finding of discrimination. It is this per se rule that

I take issue with here. Merely because a plaintiff has proffered evidence of pretext does not and should not mean that her evidence is necessarily legally sufficient to support a finding of discrimination. In my judgment, adherence to this per se rule eviscerates the requirement of Rule 56 and the Supreme Court's Liberty Lobby decision that there must be a genuine issue of material fact for the case to proceed beyond summary judgment.

An example from this case will help illustrate my point. Plaintiff William Henson was terminated from job code 276X, along with eight other employees. Henson established a prima facie case of discrimination. Defendant Seagate proffered as its nondiscriminatory reason for the lay-off that operational requirements dictated a reduction of nine employees in that job code. Then, Henson presented evidence that immediately prior to and during the lay-off, Seagate was advertising for four open positions in the same job code. On these facts, there is sufficient evidence to disbelieve Seagate's proffered reason for the lay-off. Henson has established pretext. Furthermore, at the time of the layoff, Henson was 52 years old. Of the other eight employees that Seagate terminated, four were over 40 years old. Because several of the terminated employees were above age 40, the pretext evidence and its surrounding context are such that a juror could reasonably infer that age was a determinative factor in Seagate's employment decision. Thus, the additional facts help to create a genuine issue of material fact about whether Seagate illegally discriminated against Henson. The question should go to the jury, which will make the ultimate decision whether or not to draw an inference of illegal discrimination.

If we change the facts, though, I think the conclusion also changes. If Henson had been the only employee of the nine terminated who was over the age of 40, there would no longer be a genuine issue of material fact. There would still be sufficient evidence to disbelieve Seagate's proffered reason for the lay-off because at the same time of the RIF, the company was advertising for positions in the same job code from which it was laying off workers. Thus, Henson would still have established pretext. In my judgment, though, there would be no genuine issue of material fact for trial because a jury could not reasonably conclude, on this evidence alone, that unlawful discrimination was a determinative factor in the plaintiff's termination. Discrimination comes in many shapes and sizes, but some sizes and shapes are too peculiar to support a jury verdict without additional or better evidence. The majority's assertion that we cannot consider Seagate's treatment of other employees misses my point. See maj.

op. at 12 n.2. We have an obligation to consider the quality of the pretext evidence that the plaintiff proffers. See Liberty Lobby, 477 U.S. at 254 (requiring summary judgment courts to evaluate the "quality and quantity" of the plaintiff's evidence). The majority suggests that a plaintiff should prevail at summary judgment unless there is no "possible inference of [discriminatory animus] to be drawn from" her pretext evidence. Maj. op. at 12 n.2. I disagree. To succeed at the summary judgment stage, a plaintiff must present pretext evidence that supports a reasonable inference of discrimination. Merely because an inference of discrimination is possible does not make it reasonable. In the facts of my hypothetical, while I acknowledge that an inference of discrimination is possible, I do not think that such an inference is reasonable given that the plaintiff was the only employee of the nine terminated who was over the age of 40.

This interpretation of Rule 56 in the employment discrimination context ensures that an employer will not be held liable for conduct that is not prohibited by the discrimination statute at issue. There is, of course, always a risk that a jury will incorrectly find an employer liable for discrimination because such cases always require the jury to consider conflicting evidence and evaluate the credibility of witnesses. The risk that a jury will make an incorrect finding is greatly increased, however, when the court is precluded from evaluating whether the evidence creates a genuine issue of material fact as to the ultimate question at issue in the case, namely, whether discrimination occurred. Cf. Rhodes, 75 F.3d 989 at 993 (concluding that when plaintiff has established pretext, "we are convinced that ordinarily [a verdict for plaintiff] would be supported by sufficient evidence, but not always. The answer lies in our traditional sufficiency-of-the-evidence analysis.").

We have presumed, as have some other circuits, that in St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993), the Supreme Court foreclosed the approach that I suggest here. Indeed, Hicks is the case from which our Circuit developed its current rule on pretext at the summary judgment stage. See Randle, 69 F.3d at 451. Hicks addressed whether, following a bench trial, a court must necessarily enter judgment for an employee-plaintiff upon a finding that the reasons offered by the employer for the employee's discharge were pretextual. The Court concluded that despite a factual finding of pretext, a plaintiff is not necessarily entitled to judgment as a matter of law, and the employer may prevail if the factfinder is also convinced that the employer was not motivated by discriminatory

animus. The Court, however, did not address the question that I pose here: whether, despite a showing of pretext, the court can enter judgment as a matter of law for the employer at the summary judgment stage. The following oft-quoted language from Hicks is the source of the disagreement on this question:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) *may*, together with the elements of a prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, . . . [and] upon such rejection, "[n]o additional proof of discrimination is required ...."

Hicks, 509 U.S. at 511 (emphasis added). The Eleventh Circuit concluded, I think correctly, that "[t]he first sentence of this passage shows that disbelief of the employer's proffered reason may (and by implication, may not) be enough for a plaintiff to overcome an employer's motion" for summary judgment. Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F.3d 436, 436 (11th Cir. 1996) (per curiam), cert. denied, 117 S. Ct. 2511 (1997). The Court's use of the term "permit" in the second sentence also indicates that the inference of discrimination upon evidence of pretext is allowed, but not mandatory. See id. The two sentences, "when read together, at least strongly suggest that rejecting the employer's proffered reason is not always sufficient to allow a finding of discrimination, although sometimes . . . it might be." Id. (emphasis in original). The language from Hicks is not so emphatic as to require courts to automatically deny a defendant's summary judgment motion when pretext has been established. Thus, I agree with the sensible interpretation of this language from *Hicks* offered by a noted commentator:

> [T]he Court made these statements in the context of a fully tried case. It was the plaintiff who wanted judgment as a matter of law, in order to stop the factfinder from considering the full range of evidence, including evidence undercutting the inference of intentional discrimination. The Court only said that this effort to block consideration of all the evidence must fail. The Court did not purport to

> limit the availability of summary judgment to *either* party upon consideration of *all* of the evidence relevant to pretext. Indeed, the Court stressed in *Hicks* that once a McDonnell Douglas-Burdine case reaches the pretext stage, it is to be treated like any other civil case. Nothing in *Hicks* remotely suggests that the Court is of the general view that questions of intent cannot be resolved through summary judgment.

Deborah C. Malamud, The Last Minuet: Disparate Treatment After *Hicks*, 93 Mich. L. Rev. 2229, 2305 (1995). The Supreme Court's ultimate conclusion in Hicks was that in some cases, even though facts are established at trial that cause the factfinder to disbelieve the employer's proffered reason for its employment action, application of the law to those facts will result in a jury verdict for the employer. See Hicks, 509 U.S. at 508-11; Isenbergh, 97 F.3d at 442 . The Supreme Court in Hicks "did not contract, but expanded, the universe of discrimination cases where judgment for employers would be permissible." Id. at 443. Thus, I also agree with the Eleventh Circuit in its conclusion that--

> the Supreme Court would not declare such an important new rule--the rule which [Randle] sees in Hicks--in a case in which the new rule plays no vital part in the decision .... [T]he Supreme Court would have set out such an important new rule--one that, in effect, partly nullifies two of the Federal Rules of Procedure [i.e., Rules 50 and 56]--conspicuously and plainly so that no Article III judge could miss it.

Isenbergh, 97 F.3d at 442.

Notwithstanding my above homily, with respect to plaintiff Noran, I do not even think she has proffered sufficient evidence to establish pretext. The majority relies on Exhibit 53 as evidence of pretext as to Noran. Exhibit 53 was a preliminary document compiled by Seagate in which the company was attempting to gather a large quantity of information regarding thousands of employees in order to identify which employees should be terminated in the reduction in force. The CHAPA report contains the final list of employees terminated in the RIF. According to the CHAPA report, most of the employees, though not all, targeted for

termination in Exhibit 53 were ultimately terminated in the RIF. In my judgment, nothing in Exhibit 53 suggests that Seagate was untruthful in implementing the RIF criteria generally or with respect to Noran. Our decision in Branson v. Price River Coal Co., 853 F.2d 768, 771-72 (10th Cir. 1988), requires the nonmovant's evidence of pretext to be "specific" and "probative." In my judgment, Exhibit 53 is not "probative" of pretext. Exhibit 53 contains mistakes and inconsistencies that any preliminary document would contain when a business is attempting to compile large amounts of data on its workforce. The majority states that this "alternative inference . . . is certainly permissible, but it is not our role to choose among reasonable inferences." Maj. op. at 24 n.7. In evaluating this evidence, even drawing all inferences in favor of Noran, I find that Exhibit 53 does not provide any reasonable basis to believe that Seagate's proffered reason for Noran's termination--the RIF and its implementing criteria--is untrue. I merely disagree with the majority regarding the probative value of Exhibit 53. Thus, I would hold that Noran has not proffered any evidence of pretext.

I concur in the judgment, except with respect to plaintiff Noran.

APPENDIX B

Order of the District Court Granting in part Seagate's Motion for Summary Judgment , Filed February 2, 1996.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MAUDIE BEAIRD, et al.	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. CIV-94-1473-M
	)	
SEAGATE TECHNOLOGY, INC.,	)	
	)	
Defendant.	)	

and

MOHAMMAD MOSEN ABOOGHADAREH, et al,	)	
	)	
Plaintiffs	)	
	)	
vs.	)	Case No. CIV-94-1474-M
	)	
SEAGATE TECHNOLOGY, INC.,	)	
	)	
Defendant.	)	

ORDER

Before the Court is defendant's Motion for Summary Judgment on Plaintiffs' Discharge Claims, filed November 1, 1995. Plaintiffs responded in opposition on December 11, 1995. With leave of Court, defendant filed a reply brief on January 3, 1996. Based upon the parties' submissions, the Court makes its deterMination.

Plaintiffs[1] filed this action alleging illegal discrimination when they were laid off during defendant's reduction in force ("RIF") on October 1. 1993. Plaintiffs allege age discrimination under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 et seq., disability discrimination under the Americans With Disabilities Act[2] ("ADA"), 42 U.S.C. § 12101 et seq, gender and race discrimination under Title VII and 42 U.S.C. § 1981, and violations of Oklahoma's public policy and statutes against discrimination. Defendant has moved for summary judgment on all of the plaintiffs' claims.

INTRODUCTION

After deciding to transfer its volume manufacturing and repair service operations from the Oklahoma City facility, defendant laid off 263 employees, including plaintiffs, during a reduction in force on October 1 1993. Defendant used the following criteria for its RIF selection:

(1) Operational requirements - Employee positions in various job codes were identified for elimination.

(2) Performance - This criteria was measured by two standards. Defendant considered the employee's most recent rating

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[1] There were originally 27 plaintiffs in this case. 14 plaintiffs have dismissed their claims since the case was filed.

[2] Leonard Flannery is the only plaintiff with an ADA claim. His claim is the subject of a separate motion for summary judgment filed by defendant entitled "Defendant's Motion for Summary Judgment on Unique Claims", on November 1, 1995.

received, from one (lowest) to five (highest), on the last written performance evaluation. Defendant also considered documented disciplinary actions. Any employee who received a "final warning" or was placed on the "performance improvement plan" ("PIP") within one year of the RIF selections or received a "first warning" within 90 days of the RIF selections was included in the RIF before any other employee.

(3) Potential - This was the opinion of each employee's supervisor on the employee's potential, including adaptability, promotability, initiative, flexibility, skills, team memberships, training, receipt of awards, and volunteering for overtime. Defendant asserts none of the plaintiffs were chosen because of lack of potential.

(4) Seniority - An employee's credited years of service was used as a tie-breaker when the first three criteria were equal. If employees had the same seniority, a secondary tie-breaker was used: the employee born on the earliest day of the month was selected for RIF first.

See Defendant's Master Brief in Support of Motion for Summary Judgment ("Motion") at 9-10 (November 1, 1995). Defendant claims all of the plaintiffs were selected for the RIF using the foregoing criteria and denies it discriminated against any plaintiff on any basis.

SUMMARY JUDGMENT STANDARDS

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue of material fact is genuine if a "reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The Court is not permitted to weigh the evidence submitted by the parties. Rather, the Court must view all facts and any inferences that might be drawn from them in the light

most favorable to the plaintiffs, as the nonmoving parties. Henderson v. Inter-Chem Coal Co., 41 F.3d 567, 569 (10th Cir. 1994).

PLAINTIFFS' DISCRIMINATION CLAIMS

In order for plaintiffs to prevail on their claims of discrimination, plaintiffs must be able to prove they were treated differently from similarly situated individuals. Therefore, plaintiffs must be able to meet their burden of proof under the various antidiscrimination statutes at issue in this case.

All the plaintiffs have ADEA claims. Plaintiffs must establish that age was a "determining factor" in defendant's decision to lay them off in 1993. Jones v. Unisys Corporation, 54 F.3d 624, 630 (10th Cir. 1995) (citing EEOC v. Sperry Corp., 852 F.2d 503, 507 (10th Cir. 1988)). These ADEA claims are also examined under the burden showing format outlined in the Title VII cases, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973) and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981). Id. In order to establish a prima facie case under the ADEA, a plaintiff must prove that he was (1) within the protected age group; (2) doing satisfactory work (qualified for the position); (3) discharged (or adversely affected by defendant's employment decision); and (4) replaced by a younger person. Id. See also Ingels v. Thiokol Corp., 42 F.3rd 616, 621 (10th Cir. 1994). Since an employee is not always replaced during a reduction in force, the fourth element has been modified so that a plaintiff may show by direct or circumstantial evidence that he was treated less favorably than a younger employee. Id. (citing Rea v. Martin Marietta Corp., 29 F.3d 1450, 1451 (10th cir. 1994)). Once plaintiff establishes a prima facie case, the employer must offer evidence of a legitimate nondiscriminatory reason for its decision. Id. (citing Ingels, 42 F.3d at 621, quoting St. Mary' s Honor Center v. Hicks, --- U.S.---, 113 S.Ct. 2742, 2749 (1993)). Once the employer offers such evidence, the presumption of discrimination established by plaintiff's prima facie case disappears and the burden of persuasion shifts back to plaintiff to offer evidence showing that "the defendant's proffered

reasons were really a pretext for age discrimination or by producing direct evidence of age discrimination." Id. (citations omitted). "At the summary judgment stage, if the plaintiff produces both a prima facie case and evidence supporting a finding that "defendant's alleged nondiscriminatory reasons for the employment decisions are pretextual, the case should go to the factfinder."' Id. (citing Ingels, 42 F.3d at 622)). Therefore, the essential inquiry at this stage is "whether Plaintiff has presented specific facts significantly probative to support an inference that Defendant's proffered justifications were a pretext for discrimination." Rea, 29 F.3d at 1455. (citations omitted).

As stated previously, the McDonnell Douglas burden shifting format is used to analyze Title VII claims for race, national origin or gender discrimination. The standard of proof is somewhat different for those plaintiffs with Title VII claims. A plaintiff must prove that his or her race, national origin or gender was a "motivating factor" for his or her layoff. 42 U.S.C. § 2000e-2(m). The plaintiffs with section 1981 claims must prove that race was a "but for" or "determining factor" for his or her layoff. Clark v. Atchison, Topeka & Santa Fe Railway Co., 731 F.2d 698. 702 (10th Cir. 1984).

Having carefully scrutinized the voluminous evidentiary materials[3] submitted by the parties, The Court will now analyze each of the plaintiffs' claims in light of the foregoing legal framework.

1. Leonard Flannery.

Plaintiff Flannery was a 55 year old male with 4.81 years seniority in job code 1432. He alleges age and disability discrimination and violation of Oklahoma's public policy and

[3] The Court has not yet considered the admissibility of these materials. However, the Court will assume all materials are admissible for the purpose of resolving this motion only.

"antidiscrimination statute.[4] Defendant states Flannery was one of ten employees terminated in this job code because he had a 3 rating on his last performance evaluation and he had 4.81 years of credited seniority. Plaintiff and another employee, Paul Terry both had 3 ratings and 4.81 years of credited service. Using the date of birth secondary tie-breaker, plaintiff had an earlier birth date (April 15) than Paul Terry (February 19). Therefore, defendant contends, Flannery was laid off and Terry was retained.

Plaintiff submitted the following evidence in support of his age claims[5]: (1) he was 55 years old at the time of the RIF with 4.81 years of seniority, a 3 rating and had potential; (2) Paul Terry was 28.44 years old with 4.81 years of seniority and had a 3 rating with no potential; (3) Flannery's evaluation showed he was a superior employee to Terry; (4) if defendant had used its stated criteria, performance, potential and seniority as a tie-breaker, he would not have been terminated; (5) Flannery was not on the original RIF list[6]

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[4] See Footnote 2.

[5] Plaintiff also submitted the following evidence: (1) due to an on the job back injury, he had a workers' compensation claim pending against defendant at the time of termination; (2) his 3 rating was based upon 300 points which was only one point under a 4 rating and some employees with lower points were retained; (3) he observed his second line supervisor favoring younger employees; and (4) during RIF selections. he was on temporary total disability for a period after suffering an on the job injury.

Flannery's evidence of job injuries and workers' compensation claims are irrelevant because he has not asserted a workers' compensation retaliatory discharge claim. Plaintiff's observation that his supervisor favored younger employees (he testified his supervisor talked to them more than to him) is his subjective belief unsupported by any evidence. Plaintiff's evidence concerning points does not change the rating he was given nor refute defendant's evidence that employee ratings were considered under the performance criterion and used in the RIF selection.

[6] Plaintiff refers to Plaintiff's Exhibit 53 ("PX 53"), a document prepared by the defendant identifying employees for the RIF. Defendant argues PX 53 was a preliminary document that was not used in the RIF selection. Defendant further argues its Human Resource department made the RIF selections using

scheduled for termination; (6) Terry's seniority date was only 4.79 years on the RIF list and his employee number was lower: and (7) at the time of the RIF, a new person was hired in Flannery's same job title but at a lower grade.

Flannery has clearly established a prima facie case because (1) he was over 40, (2) he was qualified (he had a 3 rating), (3) he was discharged, and (4) Terry, a younger person, was treated more favorably because he was retained. The Court, however, finds Flannery has failed to meet his burden of coming forward with evidence from which a reasonable juror could conclude that defendant's proffered reason for his termination was pretextual. Flannery presented evidence that a younger employee, Paul Terry who had a 3 rating and no potential with 4.81 years seniority, was retained. Flannery argues if defendant had used its stated criteria, performance and potential, then seniority as a tie-breaker, Flannery would have been retained and Terry would have been laid off.

Flannery's argument is similar to the argument made by the plaintiff in Rea v. Martin Marietta Corp, 29 F.3d 1450, 1459 (10th Cir. 1994) that the defendant failed to follow its own layoff policy. In Rea, the Court recognized that "disturbing procedural irregularities can be evidence of pretext." Id. However, the Court concluded that "given the large number of layoffs, and the fact that Plaintiff is able to identify only one instance where defendant selected an employee for layoff over lower ranking employees". . . the plaintiff "failed to present sufficient evidence to show a deviation from the procedural norm to view [Defendant's] reasons for [selecting Plaintiff for layoff] as pretextual."' Id. This Court likewise concludes Flannery's evidence regarding Terry, is insufficient to establish pretext. Furthermore, Flannery's assertion that Terry had

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a comprehensive employee data report called "CHAPA" report, submitted as Defendant's Exhibit 1 in support of its motion for summary judgment. Viewing the evidence in the light most favorable to plaintiffs, the Court will assume the information in PX 53 was used by the defendant. See Fallis v. Kerr-McGee Corp., 944 F.2d 743, 746 (1Oth Cir. 1991).

only 4.79 years was disproven by defendant's evidence that Terry and Flannery were hired on the same date. See Defendant's Exhibits 11 and 12 to Reply. In addition, defendant produced evidence that Johnny Littleton, the person Flannery asserts was hired into his job title, was actually hired into job code 1402. See Defendant's Exhibit 1 to Motion. Defendant is entitled to summary judgment on Flannery's age claim.

2. Ruth Noran.

Plaintiff Ruth Noran was a 61 year old female with 16.9 years seniority in job code 1432. She alleges age discrimination and violation of Oklahoma's public policy. Defendant states Noran was terminated because she was the only employee in her job code with a 2 rating on her last performance evaluation.

Noran submits the following evidence in support of her age claim: (1) she was aware of comments in the workplace regarding her age; (2) she suffered a shoulder injury in December of 1992 which limited her ability to perform some parts of her job; (3) she had surgery in April 1993 and didn't return to work until July 1993; (4) her unfavorable performance evaluation (Plaintiffs' Exhibit 26) was due to her inability to perform some physical duties in her job because of her injury; (4) she did not receive her April evaluation until July 20, 1993, after the managers knew the RIF would take place; (5) she was terminated solely because of her performance rating which was issued after the RIF was announced; (6) on PX 53, she was listed as having a 2 rating with 240 points and based on the point conversion scale, she should have had a 3 rating; (7) with a properly credited 3 rating, she would not have been terminated since no 3 rated employees with over five years seniority were terminated; and (8) two employees, Warsop and Perry, with lower performance evaluations (210 points each) and less seniority, were retained.

While her evidence may establish a prima facie case of age discrimination (Warsop and Perry are both younger than Noran and

had less points and were retained), none of her evidence supports an inference that defendant's reasons for her termination are a pretext for age discrimination. Noran's awareness of comments in the workplace regarding her age are unidentified and nonspecific. Isolated comments unrelated to the termination are not sufficient to show age discrimination. Rea v. Martin Marietta Corp., 29 F.3d 1450, 1457 (10th Cir. 1994) (citing Cone v. Longmont United States Hospital Ass'n, 14 F.3d 526, 531 (10th Cir. 1994)). Noran's evidence of her shoulder injury is immaterial because she does not have a disability claim. Noran also complains that an unfavorable evaluation performed in June 1993, see Plaintiffs' Exhibit 26, was based on her limiting physical injury and defendant's downgrading of her rating during this period is evidence that the manager was manufacturing an excuse to downgrade her. Defendant, however, presented evidence that Noran's last performance appraisal was performed on April 19, 1993 in which she was rated a 2 with 180 points and does not contain any reference to her shoulder injury. Plaintiff did not receive her April evaluation until July 20 because she was off work during that period. As discussed previously, plaintiff's arguments regarding the use of points is unavailing because it is undisputed that defendant used the 1-5 rating system to rate employee performance. Furthermore, even if plaintiff had received a 3 rating based upon the 240 points listed on PX 53, this evidence does not tend to prove defendant downgraded her to a 2 rating because of her age. Finally, even though defendant retained Warsop and Perry, who were younger and had less seniority than Noran, this fact alone does not establish pretext. Warsop and Perry both have 3 ratings on Plaintiffs' Exhibit 53. Noran has offered no evidence to show these two employees were retained because simply because they were younger. Since Noran has failed to show defendant's proffered reasons for terminating her were pretextual, defendant is entitled to summary judgment on her age claim.

3. Gerald LeCompte.

LeCompte was 65 years old with 3.83 years seniority in job code 1432. He alleges age discrimination and violation of

Oklahoma's public policy. Defendant states LeCompte and 29 other employees had a 3 rating and therefore, credited seniority was used as a tie-breaker. LeCompte was the seventh of ten employees terminated with 3.83 or fewer years of credited seniority.

In support of his age claim. LeCompte submits the following evidence: (1) his June 29, 1993 rating showed he had potential; (2) his manager, Al Giffen, initially told him he wasn't going to be laid off but when he was, Giffen told him the reason was his bad back and his age; (3) he was denied a position as a forklift driver and receiving clerk in favor of a younger and stronger employee; (4) Terry Paul a younger employee with no potential and who wouldn't work, was retained; and (5) he trained temporaries who were called back after the layoff.

LeCompte establishes a prima facie case because there is evidence a younger employee in his job code, Paul Terry, was treated more favorably. The Court also finds LeCompte has come forward with sufficient evidence of pretext. LeCompte testified in his deposition that his manager, Giffen, told him he was being laid off because of his age and bad back. While defendant argues this was a stray remark by a non-decision maker, the Court finds this is not a stray remark. See Cone, 14 F.3d at 531 ("Age-related comments referring directly to the worker may support an inference of age discrimination") (citation omitted). Even if the Human Resources Department made the final RIF selections, their decisions were based on employee evaluations and performance appraisals given by the plaintiffs' supervisors or immediate managers. See e.g. Defendant's Exhibit 16 to Reply, Performance Appraisal of Shirley McCartney, signed by Al Giffen, as supervisor as well as a manager and a person from the Human Resources Department. Therefore, Giffen was a decision maker in the RIF selection process. Plaintiff LeCompte's claims survive summary judgment.

4. Shirley McCartney.

Plaintiff McCartney was a 45 year old female with 22.15 years seniority in job code 1433. She alleges age discrimination and violation of Oklahoma's public policy. Defendant states McCartney was one of fifteen employees with 3 ratings (seven employees had 3 ratings and less seniority than McCartney) selected for layoff and her 3 rating was the sole basis for its decision.

In support of her claim for age discrimination, McCartney provides the following evidence: (1) she previously had a 4 rating, then a 5 rating, then she was downgraded to a 4 rating; (2) she was not originally on the RIF list; and (3) three men evaluated as having no potential (Ralph Rodgers, Charles Seaton, and Gary Roberts) were retained.

Plaintiff McCartney's evidence fails to establish a prima facie case of age discrimination. Defendant produced evidence that the three men plaintiff stated were retained without potential were all older than plaintiff. Therefore, plaintiff has produced no evidence that younger employees were treated more favorably than she. Defendant also produced evidence that plaintiff was never rated a 5 and was only once rated as a 4. Finally, even if she had established a prima facie case, McCartney has failed to provide any evidence that there was any other reason for her selection for termination other than her 3 rating. Defendant is entitled to summary judgment on McCartney's age discrimination claim.

5. Rosa Clark.

Plaintiff Clark was a 51 year old black female with 23 years seniority in job code 1433. Clark alleges age and race discrimination and violation of Oklahoma's public policy. Defendant states Clark was one of fifteen employees with a 3 rating terminated (nine employees with 3 ratings had less seniority than she) and this was the sole reason for her termination.

In support of her claims, Clark provided the following evidence: (1) her supervisor, Rita Holland, had previously fired

another black employee, Madge Roberts; (2) Holland had asked two other employees to assist her in firing Clark and she complained in writing to Marilyn Owens and Lee Johnson in the Human Resources Department on July 12, 1993, after she learned about it; (3) she observed Holland favoring younger, white employees; (4) she received a very favorable evaluation on June 27, 1993; (5) Mary McCartney (Clark mistakenly referred to her as Shirley), a white employee with less seniority and listed ahead of her for termination. was retained; and (6) defendant determined that based on higher points, she would not have been terminated.

To establish a prima facie case of age or race discrimination, Clark must provide evidence that a younger person or a nonminority person was treated more favorably. See Jones, 54 F.3d at 630; Clark, 731 F.2d at 701-02. Clark's evidence fails to establish this element of her case. Clark attributes Holland's firing of Madge Roberts and request for assistance in firing her to Holland's bias against her based on age and race. Clark testified she did not know why Roberts was fired and produced no evidence that it was racially motivated. Defendant correctly asserts Roberts' firing does nothing to support Clark's claim that her termination was racially motivated. Even Clark's complaint letter to Human Resources fails to mention that she believed Holland was trying to get her fired because of her age and/or race. The letter only states plaintiff will not put up with harassment from Holland which could stem from any number of reasons that have nothing to do with Clark's age. Clark's evidence that Mary McCartney, a white employee with less seniority, was retained also does not help plaintiff on either claim because defendant produced evidence that McCartney was in a different job code (1432) and was older than Clark. Clark's belief that her supervisor favored young, white employees is merely conjecture and unsupported by factual evidence. Branson v. Price River Coal Co., 853 F.2d 768, 772 (10th Cir. 1988). As previously mentioned, Clark's reliance on points is immaterial because it is undisputed defendant used the 1-5 rating system. Furthermore, even if Clark had established a prima facie case for age and/or race discrimination, none of her evidence shows defendant's reasons for terminating her

were pretextual. Defendant is entitled to summary judgment on her claim.

6. Jerlene Bush.

Plaintiff Bush is a 50.5 year old black female with 23 years seniority in job code 1433. Bush alleges age and race discrimination and violation of Oklahoma's public policy. Defendant states Bush was one of fifteen employees with a 3 rating laid off (12 employees had less years of service than Bush) and this was the sole reason for her termination.

In support of her claims, Bush provides the following evidence: (1) she orally complained to her supervisor about low ratings, (2) she attributed the lower ratings to her race, age and gender; (3) she observed an atmosphere of discrimination at Seagate against older, black women, and (4) at the time of the RIF, defendant transferred two younger nonblack employees to do the jobs of Bush and plaintiff Bobo, and the transferees were retained.

Like plaintiff Clark, Bush must provide some evidence that a younger or nonminority person was treated more favorably than she was. This Bush cannot do. Defendant provided evidence that Carolyn Muse, a younger white employee was placed in a different job code, 402, and had a 4 rating. Defendant also provided evidence that James Russell Hunter, a younger black employee was placed in a different job code, 1432, and had a 4 rating. Furthermore, Bush only speculates about why her ratings were lower without any evidence to support such speculation. Bush's feeling that Seagate discriminated against older, black women is unsupported in the record. Even if Bush could establish a prima facie case, none of her evidence is sufficient to support an inference of age or race based discriminatory animus on the part of the defendant in its RIF selections. Defendant is entitled to summary judgment on plaintiff Bush's age and race claims.

7. Mildred Bobo.

Plaintiff Bobo was a 60 year old black female with 21.71 years seniority in job code 1433. Bobo alleges age and race discrimination and violation of Oklahoma s public policy. Defendant states Bobo was one of fifteen employees with 3 ratings laid off (five employees had less credited service than Bobo) and this was the only reason for her termination.

In support of her claims, Bobo provided the following evidence: (1) she complained to her supervisor that she was not given credit on her performance appraisals for training on new duties; (2) she was afraid to note this in the employee comment section of the appraisal because her supervisor threatened her if she complained; and (3) her supervisor favored younger employees and sent them to training schools but did not send her.

Viewing Bobo's evidence in the light most favorable to her, Bob can establish a prima facie case of age discrimination if her supervisor treated younger employees more favorably than her by sending them to training. However, none of Bobo's evidence tends to show that age was a factor in her termination. Bobo believes she should have been credited with training on new duties and presumably her evaluation would have been rated higher. However, she does not allege she was not given credit because of her race or age. Furthermore, her opinion of how she should have been rated higher is not relevant. See Fallis v. Kerr-McGee Corp., 944 F.2d 743, 747 (10th Cir. 1991), Branson v. Price River Coal Co., 853 F.2d 768, 772 (1Oth Cir. 1988). While she may have been afraid to note her concerns in the employee comment section, Bobo presented no evidence that she was prevented from doing so. As for plaintiff's race claim, Bobo testified in her deposition she has no facts to support her allegation that she was discriminated against because of her race. See Exhibit 21 to Defendant's Reply to Plaintiffs' Joint Response to Defendant's Master Motion for Summary Judgment and Motion for Summary Judgment on Unique Claims ("Reply")

(January 3, 1996). Defendant is entitled to summary judgment on plaintiff Bobo's age and race claims.

8. Claudia Johnson.

Plaintiff Johnson was a 45 year old black female with 22.28 years seniority in job code 1433. Johnson alleges age and race discrimination claims and violation of Oklahoma's public policy. Defendant states Johnson was one of fifteen employees with 3 ratings laid off (8 other employees had less seniority than Johnson and were selected before her) and this was the only reason she was terminated.

In support of her claims, plaintiff provides the following evidence: (1) her supervisor favored younger employees and let them go to meetings and excluded her; (2) her supervisor allowed younger employees to call her "grandmother"; (3) she observed younger employees doing less work than older employees; (4) she saw a younger white employee moved into her area who was rated higher even though the employee was still learning the job; (5) at the time her appraisal was downgraded from a 4 to a 3, defendant knew it was going to layoff employees; (6) as of July 13, 1993, she was performing at a 4 level and under this rating she would not have been terminated; and (7) she was on an appraisal committee and heard that only employees with 2 ratings would be terminated.

Johnson establishes her prima facie cases of race and age discrimination by producing evidence that a younger, white employee, Kathy Keffer, received a higher rating, had less seniority and was retained. However, none of plaintiff's evidence establishes defendant's reason for terminating her based upon her 3 rating was pretextual. While Johnson stated that her supervisor excluded her from meetings, she testified that she was able to go to some but thought she should have been able to attend all of them. She also testified when she asked the employee to call her by her name instead of "grandmother", the employee stopped. Johnson did not produce evidence that her supervisor encouraged this behavior or even heard the employee. Johnson's evidence that Keffer was

younger and had less seniority, without more, does not establish pretext. Plaintiff produces no evidence that Keffer was rated higher because of her age or race or that plaintiff was rated lower because she was older and black. Likewise, Johnson's testimony that her supervisor, Richard Needham, told her not to worry about her downgrading from a 4 to a 3 rating because she was protected by seniority from layoffs is unavailing. Even if Needham knew about the layoffs when he marked her down to a 3, plaintiff has produced no evidence that Needham did so based on her age or race. The July 13, 1993 employee evaluation Johnson relies on to support her opinion she was performing at a 4 rating level does not help her. Defendant produced evidence that plaintiff's own Exhibit 23 lists Johnson's previous rating as a 4 on December 28, 1992 and that she received a later "low 3" rating as evidenced by her supervisor's comments. Finally, Johnson's belief that only 2 rated employees would be laid off is based on stray remarks from nondecisionmakers which is insufficient to prove age discrimination. See Jones v. Unisys Corp., 54 F.3d 624, 632 (10th Cir. 1995) (citing Cone, 14 F.3d at 531). Defendant is entitled to summary judgment on plaintiff Johnson's race and age claims.

9. Margaret Jones.

Plaintiff Jones was 52 years old with 3.49 years seniority in job code 1032, from which one hundred sixteen employees were laid off. Jones alleges age discrimination and violation of Oklahoma's public policy. Defendant states Jones was one of nineteen employees with 3 ratings and 3.49 years seniority laid off in her job code. Since 21 employees had 3 ratings and 3.49 years credited seniority, defendant used its secondary tie-breaker, the employees with earliest birth dates of the month were laid off first. Employees Sandra Brown and Quoc Chau were born on the 31st day of the month and plaintiff was born on the 8th day. Brown and Chau were retained.

In support of her age discrimination claim, Jones submitted the following evidence: (1) many machine operators who were

younger, had lower points, and rated as having no potential were retained, (for example, Elaine Bailey (41), JoAnne Bolden (48), Brett Brewer (26.8), Annamma George (28) and Barbara Brown (37)); (2) Chau, 30 years old, was retained with a low 3 rating and no potential; (3) Jones had potential on her July 29, 1993 evaluation; and (4) Jones was identified as having a ratings deviation going from 4 to 3 based on an evaluation that took place after the RIF was announced, and she was terminated instead of being retained.

Jones has established her prima facie case by producing evidence that younger employees were treated more favorably than her because several were retained despite having no potential. This is not however, any evidence from which a jury could conclude defendant's proffered reason for terminating her was a pretext for age discrimination. Jones reliance on defendant's deviation from its RIF selection criteria with regard to retaining younger employees rated has having no potential is insufficient. See Rea, 29 F.3d at 1459 and previous discussion of Flannery's claim. While Jones provided a document which could mean she had a deviation in her rating from 4 to 3, she has not presented any evidence that any deviation was made because of her age. Furthermore, defendant produced evidence that Jones had 3 ratings on her last two appraisals. See Defendant's Exhibit 18 to the Motion and Exhibit 24 to the Reply. Defendant is entitled to summary judgment on Jones claim.

10. Margie Ferguson.

Plaintiff Ferguson was 55 years old with 27.2 years seniority in job code 1032. Ferguson alleges age discrimination and violation of Oklahoma's public policy. Defendant states Ferguson was was laid off because she was on active disciplinary status and received a final warning for attendance and performance problems on November 6, 1992, within one year of the RIF selections.

In support of her age claim, Ferguson provides the following evidence: (1) prior discipline is not a stated basis for termination in

any of the written RIF criteria; (2) she cannot be considered on active disciplinary status because her July 14, 1993 evaluation states she has met her obligations under the performance improvement plan and she is performing in the 3 range; (3) she had a recent performance appraisal showing she met all requirements (3 rating); (4) Elaine Bailey, a younger employee was on more recent disciplinary action, had no potential, and was retained; (5) Ahmad Riaz, a younger employee who was listed on the RIF list with a 2 rating, was retained; and (6) 60 employees who had equal or less performance and less seniority were retained instead of her.

Ferguson establishes a prima facie case by producing evidence that Riaz may have been rated a 2 and still retained. However, none of plaintiff's evidence establishes defendant's reason for her termination was pretextual. Plaintiff never disputes the fact that she received a final warning within one year of the RIF selection or alleges that she was placed on disciplinary status because of her age. Plaintiff's argument that employee discipline should not be considered under the performance criterion is meritless because Ferguson was disciplined for poor performance and attendance problems. See Defendant's Exhibit 12, Margie Ferguson's Employee Counseling Form. Comments on her most recent performance evaluation do not change the fact that she had an active final warning. Therefore, even if Riaz had been rated a 2, Ferguson would still have been terminated under the RIF selection criteria.

Defendant also produced evidence that Elaine Bailey received her first warning on March 3. 1993, more than 90 days before the RIF selection (August 2, 1993) which was consistent with its RIF selection criteria. Ferguson would have been selected for termination based on her disciplinary status before Bailey would have been selected for no potential. Plaintiff has failed to come forward with any evidence of pretext. Defendant is entitled to summary judgment on Ferguson's age claim.

11. Nernatollah Moini.

Plaintiff Moini is a male of Iranian descent with over 4 years seniority service in job code 6331. Moini alleges race and national origin discrimination and violation of Oklahoma's public policy. Defendant states Moini was laid off after it determined one position in the non-pooled job code 6331, under Vice President Ron Klas in the New Building Manufacturing Department would be included in the RIF. Furthermore, Moini received a written disciplinary action and was placed on performance improvement program on May 5, 1993, within 90 days of the RIF selection.

In support of his claims. Moini submits the following evidence: (1) one caucasian American in his department with equal ratings and less seniority was retained: (2) at least six other employees had no evaluations and less seniority were retained; (3) defendant's prior practice had been to compare engineers throughout the company rather than treating them as non-pooled; (4) there was a vacancy for an advisory electrical engineer at the time of the RIF; (5) defendant hired someone with Moini's same job title during the RIF; (6) Moini had filed a recent complaint of race and national origin discrimination by his supervisor with the Human Resources Department on May 18, 1993; (6) he was placed on disciplinary status by the same supervisor who was the subject of his complaint; (7) Human Resources issued a statement on July 12, 1993 neither confirming or rejecting his report of discriminatory conduct; (8) another employee, Duan Le was originally scheduled for termination but was allowed to transfer to another department; (9) the number of electrical engineers scheduled to be lost from his job code appears to have been changed from 1 to 2; (10) there are reports which seem to indicate Moini was added to the RIF list after Human Resources issued its July 12 memo in response to his complaint; (11) as of July 20, 1993, no actual terminations in job code 6331 would be necessary; (12) defendant was aware of his EEOC claim when Human Resources was making RIF selections; (13) defendant hired another person into his job code in February 1994 (after the RIF);

and (14) Moini applied for several positions for which he was qualified but was not hired by defendant.

Moini establishes a prima facie case of race or national origin discrimination because Hughes, a white employee with less seniority was retained. Defendant produced a nondiscriminatory reason for Hughes' transfer, that he was not on active disciplinary status. However, viewing plaintiff's evidence in the light most favorable to him, the Court finds Moini has offered sufficient circumstantial evidence from which a jury could conclude that defendant's proffered reasons for his termination were pretextual. Plaintiff had a written discrimination complaint on file against his supervisor documenting discriminatory comments and actions occurring over a year. Defendant was aware of Moini's EEOC complaint and referenced it in the Specific Concerns memo dated July 28, 1993. There is also some evidence in the record that Moini may have been placed on the RIF list by Lee Johnson of the Human Resources Department after Johnson investigated Moini's complaint. Defendant is not entitled to summary judgment on Moini's claims.

12. Maudie Beaird.

Plaintiff Beaird is a 60 year old black female manager with over 28 years seniority in job code 9104. Beaird alleges age, race and gender discrimination and violations of Oklahoma's public policy. Defendant states Beaird was one of fifteen employees laid off in this job code. All employees with 2 or 3 ratings were laid off. There was only one employee with a 2 rating and Beaird was one of fourteen employees with 3 ratings. She was the only female out of the fifteen employees laid off.

In support of her claims, Beaird submitted the following evidence: (1) she had experienced discrimination by her supervisors, Ms. Paneno and Mr. Roller; (2) Paneno wrote the appraisal upon which her termination was based; (3) in her organization, all of the minority managers were fired and only younger, white males were kept; (4) Seagate expected more from its older workers than

younger workers and gave its older workers lower performance appraisals; (5) two younger white employees, Eugene Fisher and Billy Hindman, both with 3 ratings on PX 53, and who were scheduled for termination were retained; (6) Seagate does not have any black, female managers; and (7) Seagate knew there was an issue of its performance ratings being biased.

Viewing her evidence regarding Hindman and Fisher in the light most favorable to her, Beaird has established her prima facie cases of age, race and sex discrimination. Assuming both Fisher and Hindman had 3 ratings according to PX 53, they were treated more favorably than Beaird. However, none of Beaird's evidence tends to show that defendant's decision to lay her off was motivated by her age, sex or race. Plaintiff's evidence of age discrimination proves nothing. Beaird stated that Seagate expects more from its older workers but admitted in her deposition that she, as a manager, also expects more from her older workers. See Defendant's Exhibit 23 to Reply, Beaird Deposition excerpts pp. 67-68. See also Fallis, 944 F.2d at 745 (holding older, more experienced geologists to a higher standard than younger geologists does not raise an inference of age discrimination). Beaird produced no evidence to support her belief that workers over 40 were rated lower than workers under 40. Plaintiff's evidence of age and/or race discrimination also does not help prove pretext. Beaird alleges she was discriminated against in 1990 by her supervisor when she was removed from her first line supervisor position. Beaird fails to show how this alleged discriminatory action in 1990 relates to her RIF selection in 1993. Furthermore, Beaird testified she was satisfied when she was later moved to a first line manager position in another department. See Beaird's Deposition excerpt, Exhibit 23 to defendant's Reply. Beaird's assertion that it was Paneno's performance appraisal which was used in the RIF selection, without more, is insufficient to show pretext. Paneno rated Beaird as a 3 and praised her work performance. See Defendant's Exhibit 10 to Motion. Beaird's belief that all the old and minority managers were fired and only younger white managers retained as well as her belief that there are no black female managers in Oklahoma City are not supported by any factual

evidence.[7] Defendant submitted evidence of the demographics for the Oklahoma City facility that shows the percentages of minorities before and after the RIF either stayed the same or changed by one percentage point. See Motion at 11 and 41. Furthermore, Plaintiffs' Exhibit 17 only states that defendant's first line managers would "argue" the performance ratings were biased.

As for her gender discrimination claim, plaintiff relies on the favorable treatment of Fisher and Hindman. However, defendant presented evidence that Hindman posted to another position and Fisher had a 4 rating on its CHAPA report. Even if Fisher's rating was changed from 3 to 4, this evidence does not create a reasonable inference that Beaird was selected for termination because she was a woman. Because plaintiff has failed to come forward with any evidence tending to prove defendant's reason for terminating her was a pretext for unlawful discrimination of any type, defendant is entitled to summary judgment on Beaird's age, race and gender claims.

13. William Henson.

Plaintiff Henson was a 52 year old male with 28 years seniority in job code 276x. Henson alleges age discrimination and violation of Oklahoma's public policy. Defendant states Henson was one of nine employees laid off. Henson had a 2 rating on his last performance appraisal and the other eight employees had 3 ratings.

In support of his age claim, Henson provided the following evidence: (1) he was a quality engineering technician and during the RIF, Seagate was placing people in open positions; (2) Seagate continued to lay people off although there were at least seven open

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[7] Beaird testified that she believes Seagate discriminated in 1993 because there were newspaper articles stating there was age discrimination in the 1991 layoffs. Plaintiff did not produce these articles. However, even if she could produce them, the 1991 articles would not establish defendant's reasons for her termination in 1993 were pretextual.

positions; (3) he applied for three open positions but was not selected for any of them and one position was filled by Sam McLaughlin, a younger person; (4) Seagate was hiring people in his job title before and after the lay off; (5) in his experience, Seagate expects more from older people than younger people, rates older people unfairly and favors younger employees; (6) his job code was 293x until just before the RIF when it was changed to 276x; and (7) he believes he is qualified for his job.

Henson fails to even establish a prima facie case of age discrimination. Henson's only evidence of a younger person treated more favorably was defendant's selection of a younger person for an open position. Defendant, however, produced evidence that McLaughlin was 40, selected for lay off in job code 2933, had a 3 rating and posted into another position. Even if Henson could establish a prima facie case, none of his evidence tends to prove defendant's reason for terminating him, his 2 rating, was pretextual. Henson never disputes his 2 rating or nor does he even allege his supervisor gave him a 2 rating because of his age. See Rea, 29 F.3d at 1456 (lowest ranked employee in department laid off). Most of Henson's arguments focus on open job positions he did not receive and defendant's continual hiring of employees during the layoffs. Henson has presented no evidence that he was qualified for or more qualified than those selected for the open positions. See Jones, 54 F.3d at 631, Rea, 29 F.3d at 1457. Furthermore, Seagate's hiring of employees before, during and after a layoff does not establish pretext for its employment decision regarding Henson. See Fallis, 944 F.2d at 745 n.2 (at most such evidence shows defendant may have been "unable to achieve its reduction in force with absolute precision"). Plaintiff's subjective belief he is qualified for the job is not enough. Id. at 747; Rea, 29 F.3d at 1456. Finally, defendant explained the reason Henson's job code was changed from 293x to 276x was to ensure the accuracy of its records before the RIF. Henson was one of several employees whose job code was changed and the evidence in the record shows Seagate reclassified many different job codes. See Plaintiffs' Exhibit 63. Defendant is entitled to summary judgment on plaintiff Henson's age discrimination claim.

STATE CLAIMS

All of the plaintiffs have asserted claims of wrongful discharge in violation of Oklahoma's public policy against discrimination based upon the same set of facts on which they based their federal claims. To the extent the Court has found plaintiffs have failed to present sufficient evidence to raise a genuine issue for trial on their federal claims, the Court finds the same on plaintiffs' state claims.

CONCLUSION

Based on the foregoing, the Court

(1) **GRANTS** defendant's motion for summary judgment [Docket #69] as to all federal and state discrimination claims of plaintiffs Flannery (ADEA only), Noran, McCartney, Clark, Bush. Bobo, Johnson, Jones, Ferguson, Beaird and Henson; and

(2) **DENIES** defendant's motion for summary judgment [Docket #69] as to the federal and state discrimination claims of plaintiffs LeCompte and Moini.

IT IS SO ORDERED this 2nd day of February, 1996.

/s/ Vicki Miles-LaGrange
VICKI MILES-LaGRANGE
UNITED STATES DISTRICT JUDGE
ENTERED IN JUDGEMENT
DOCKET ON 2-2-96

(2)

No. 98-370

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In The

Supreme Court of the United States

October Term 1998

SEAGATE TECHNOLOGY, INC.,

Petitioner,

v.

MAUDIE BEAIRD, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF *AMICUS CURIAE* SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Society for Human Resource Management ("SHRM") presents this brief in support of Seagate Technology, Inc.'s Petition for a Writ of Certiorari.[1]

SHRM is an international organization designed to equip human resources professionals as leaders and decision-makers within their organizations. SHRM represents the interests of approximately 104,000 members in all 50 states and in 18 countries. SHRM's members are responsible for making daily employment decisions affecting tens of millions of applicants and employees.

SHRM is filing a brief in this case because the split among the circuits on the standard for summary judgment in disparate treatment employment discrimination cases affects its members' abilities to make employment decisions based on merit, ability, and other legitimate bases. The "no evidence" summary judgment standard, which allows applicants and employees to avoid summary judgment without presenting legally sufficient evidence of intentional discrimination at the summary judgment stage, chills this ability because in "no evidence" circuits, the federal courts are able to apply hindsight to second guess employers' decisions. As a result, juries become "super personnel departments" reviewing human resources professionals' business judgment. The approach dictated by this Court in

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[1] Counsel for SHRM, Thomas H. Lawrence, certifies pursuant to Supreme Court Rule 37.6 that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

its *St. Mary's Honor Center v. Hicks* decision is better. Applying *Hicks*, human resources professionals can make personnel decisions based upon the facts then known, with the assurance that a mere denial of those facts will not be legally sufficient to void those good faith decisions.

Resolving the split among the circuits and providing guidance to SHRM's membership and the other human resources professionals in the United States regarding the applicable summary judgment standard will enable SHRM to more readily educate its membership on their human resources roles and avoid a patchwork scheme of decision-making oversight by federal courts. Failure to resolve the split will likely encourage businesses to consider "circuit geography" in making relocation decisions.

This brief is filed with the consent of both parties, and letters reflecting this consent have been filed with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

There is a clear split among the federal courts of appeals on the precise issue presented by this petition – the appropriate standard for summary judgment in disparate treatment employment discrimination cases.[2] The First

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[2] *Compare Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1067 (3d Cir. 1996) (*en banc*); *Aka v. Washington Hospital Center*, No. 96-7089, 1998 U.S. App. LEXIS 24929 (D.C. Cir. Oct. 9, 1998) (*en banc*); *Weisbrot v. Medical College of Wisconsin*, 79 F.3d 677, 682, n.5 (7th Cir. 1996); *Randle v. City of Aurora*, 69 F.3d 441, 453, n.17 (10th Cir. 1995) (*en banc*); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1532 (11th Cir. 1997), *cert.*

Circuit, Second Circuit *en banc*, Fifth Circuit *en banc*, and Eighth Circuit *en banc* hold that this Court's opinion in *St. Mary's Honor Center v. Hicks*[3] requires an employee to raise a genuine issue of material fact regarding intentional discrimination in order to survive an employer's motion for summary judgment. The Third Circuit *en banc*, the District of Columbia Circuit *en banc*, the Seventh Circuit, the Tenth Circuit *en banc*, and the Eleventh Circuit disagree. These latter circuits hold that an applicant or employee may avoid summary judgment merely by raising a genuine issue of material fact as to pretext even if there is no accompanying evidence of intentional discrimination.

All circuits concede that *Hicks* requires an applicant or employee to prove intentional discrimination to win at trial. It follows that to survive summary judgment, an applicant or employee must produce evidence sufficient to raise a genuine issue of material fact as to intentional discrimination. Fed. R. Civ. P. 56. While evidence tending to show pretext may sometimes be sufficient to raise an

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denied, 118 S. Ct. 685 (1998) (following the "pretext only" interpretation of *Hicks*, which is referred to herein as the "no evidence" approach) *with Woods v. Friction Materials, Inc.*, 30 F.3d 255 (1st Cir. 1994); *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997) (*en banc*), *cert. denied*, 118 S. Ct. 851 (1998); *Rhodes v. Guiberson Tools*, 75 F.3d 989 (5th Cir. 1996) (*en banc*), *cert. denied*, 502 U.S. 868 (1997); *Ryther v. KARE 11*, 108 F.3d 832 (8th Cir.), *cert. denied*, 117 S. Ct. 2510 (1997) (requiring that a plaintiff present, at the very least, some evidence of intentional discrimination in order to avoid summary judgment).

[3] 509 U.S. 502 (1993).

issue of material fact as to discrimination, this certainly is not always the case.

Since 1993, this "no evidence" reading of *Hicks* has taken hold in several circuits. The confusion has developed into a major split in the circuits, including conflicting *en banc* circuit decisions.

The Courts of Appeals – like the Tenth Circuit – that allow "no evidence" cases to proceed beyond the summary judgment stage are, in effect, overturning this Court's decision in *Anderson v. Liberty Lobby*[4] by allowing plaintiffs to avoid summary judgment without creating a material factual dispute on intentional discrimination, a necessary element which plaintiffs must ultimately prove at trial.[5] This confusion has created uncertainty, post-*Hicks*, in the interplay between the *McDonnell Douglas/Burdine*[6] burden shifting analysis and summary judgment practice under *Anderson*.[7] Allowing this modification in the

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[4] 477 U.S. 242 (1985).

[5] *Id.* at 252.

[6] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

[7] Thomas Duley, Comment, *Summary Judgment and Title VII After Hicks: How Much Evidence Does It Take to Make an Inference?*, 28 U.C. DAVIS L. REV. 261, 275-76 (1994) (stating that "two interpretations of *Hicks* have confused courts' rulings on employers' summary judgment motions"); Richard L. Alfred & Michael D. Ricciuti, *Burden of Production and Proof in Employment*

summary judgment standard risks requiring a jury trial in every disparate treatment employment discrimination case in the "no evidence" circuits.

The question raised by this petition potentially arises in thousands of discrimination cases each year. Employment discrimination cases are among the most common types of federal civil cases. Summary judgment plays a crucial role in allocating judicial and economic resources in these cases. That six Courts of Appeals have held *en banc* hearings on this issue proves its importance. Only this Court can resolve the existing circuit split.

Discrimination Cases: An Endangered Future for Summary Judgment Motions?, 38 BOSTON B.J. 7, 21-22 (1994) (indicating confusion regarding evidence necessary to preclude summary judgment in Title VII cases); Jody H. Odell, Comment, *Between Pretext Only and Pretext Plus: Understanding St. Mary's Honor Center v. Hicks and its Application to Summary Judgment*, 69 NOTRE DAME L. REV. 1251, 1267-73 (1994) (setting forth two alternative interpretations of *Hicks* regarding sufficiency of pretext evidence).

ARGUMENT

I. The Court should grant the petition to resolve a split among the federal courts of appeals, including *en banc* decisions.

A. The federal courts of appeals are split over the standard for summary judgment in disparate treatment cases.

In *St. Mary's Honor Center v. Hicks,* this Court wrote the following passage:

> The factfinder's disbelief of the reasons put forward by the defendant ... may, together with the elements of the prima facie case, suffice to show intentional discrimination.[8]

Commentators have recently examined the sharp division among the circuits over this passage and the devastating impact this division is having, and will continue to have, on summary judgment practice in employment discrimination cases:[9]

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[8] 509 U.S. 502, 511.

[9] *See* R. Alexander Acosta and Eric J. Von Vorys, *Bursting Bubbles and Burdens of Proof: Disagreements on the Summary Judgment Standard in Disparate Treatment Employment Discrimination Cases*, 2 TEX. REV. LAW AND POL. 207 (Spring 1998) [hereinafter *Bursting Bubbles*] ("An ambiguous sentence in *Hicks*, ironically, has created a new circuit split regarding the amount of evidence that an employee must present in order to survive an employer's

> This passage might mean that the factfinder is always free to infer intentional discrimination from evidence that establishes a *prima facie* case and raises an issue of fact concerning the veracity of the proffered reasons. It might also mean, however, that a factfinder is enabled, only in appropriate cases, to infer intentional discrimination from this evidence.
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> * * *
>
> The difference between these two meanings is substantial. Under the former meaning, an employment discrimination case will always proceed to trial if the employee raises a genuine issue of fact regarding the veracity of the employer's proffered reason. This is not difficult to do. A district court could not, based on sufficiency of the evidence, grant an employer's motion for judgment and the appellate court could not review the factfinder's verdict for sufficiency of the evidence. Under the latter meaning, however, a district court could ask whether the evidence taken as a whole could support a finding of intentional discrimination. If it does not, the district court could enter judgment in favor of the employer.[10]

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motion for summary judgment or judgment as a matter of law.").

[10] *Id.* at 209.

The division among the circuits on this substantial issue is pervasive. The Third Circuit (in a ten to one decision),[11] the District of Columbia Circuit (in a seven to four decision)[12] the Seventh Circuit,[13] the Tenth Circuit (in a panel decision unanimously adopted by the *en banc* court),[14]

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[11] *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1067 (3d Cir. 1996) (*en banc*) ("[A] plaintiff may survive summary judgment (or ... judgment as a matter of law) if the plaintiff produced sufficient evidence to raise a genuine issue of fact as to whether the employer's reasons were not its true reasons for the challenged employment action."), *cert. denied*, 117 S. Ct. 2532 (1997).

[12] *Aka v. Washington Hospital Center,* No. 96-7089, 1998 U.S. App. LEXIS 24929, *17 (D.C. Cir. Oct. 9, 1998) ("we therefore reject any reading of *Hicks* under which employment discrimination plaintiffs would be routinely required to submit evidence over and above rebutting the employer's stated explanation in order to avoid summary judgment.").

[13] *Weisbrot v. Medical College of Wisconsin*, 79 F.3d 677, 682, n.5 (7th Cir. 1996) (reviewing the competing interpretations of *Hicks* in other circuits and reaffirming its position).

[14] *Randle v. City of Aurora,* 69 F.3d 441, 453, n.17 (10th Cir. 1995) (*en banc*) ("[A] civil rights plaintiff may withstand a motion for summary judgment and is entitled to present his claim to the factfinder if the plaintiff establishes a *prima facie* case and presents evidence that the defendant's proffered nondiscriminatory reason was pretextual, *i.e.*, unworthy of belief.").

and the Eleventh Circuit[15] have adopted the former interpretation. These circuits place no burden on plaintiffs to demonstrate the existence of a material issue of fact as to intentional discrimination at the summary judgment stage. In contrast, the First Circuit,[16] the Second Circuit *en banc*,[17] the Fifth Circuit *en banc*,[18] and the Eighth Circuit *en banc*[19] have adopted the latter view.

The "no evidence" rule is incorrect in light of this Court's opinion in *Hicks*. *Hicks* holds that the plaintiff at all times retains the ultimate burden of proof as to intentional discrimination.[20] The "no evidence" rule, as Judge Tacha explained below in her dissent in this case, is especially troubling because it modifies the summary judgment standard dictated by this Court:

> This Circuit's treatment of pretext evidence has inappropriately circumscribed district

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[15] *Combs v. Plantation Patterns*, 106 F.3d 1519, 1532 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 685 (1998).

[16] *Woods v. Friction Materials, Inc.*, 30 F.3d 255 (1st Cir. 1994).

[17] *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997) (*en banc*), *cert. denied*, 118 S. Ct. 851 (1998).

[18] *Rhodes v. Guiberson Tools*, 75 F.3d 989 (5th Cir. 1996) (*en banc*), *cert. denied*, 502 U.S. 868 (1997).

[19] *Ryther v. KARE 11*, 108 F.3d 832 (8th Cir.), *cert. denied*, 117 S. Ct. 2510 (1997).

[20] 509 U.S. at 508.

> courts' powers under Rule 56 . . . . I believe the proposition that an employer can never succeed at summary judgment upon a showing of pretext is inconsistent with Rule 56 and is not, as we have presumed, dictated by Supreme Court precedent.[21]

A simple example shows the problem with the "no evidence" standard. An employee who is within a protected class of employees under Title VII is disliked by his supervisor solely because of personal reasons. The supervisor knows that he cannot request that the human resources department terminate the employee because of the supervisor's personal animosity, so the supervisor harshly grades the employee's performance, places the employee on a performance improvement plan, and ultimately terminates the employee for performance reasons.

The employee files a lawsuit against the employer and submits affidavits from former co-employees that he was performing at the same level as these other employees who were still employed. He also presents evidence that the real reason for the termination was the supervisor's personal animosity and not poor performance. But he submits no

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[21] *Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159, 1176 (10th Cir. 1998); *see Aka,* 1998 U.S. App. LEXIS 24929, at *100 (Henderson, J., dissenting) ("To survive summary judgment, the plaintiff must always produce independent evidence of discrimination. Only if we require such a showing do we preserve the plaintiff's congressionally mandated burden to show that the employer's real reason for its personnel decision was discrimination on the basis of the plaintiff's membership in a protected class.").

evidence that intentional discrimination was the real reason for the termination.

Thus, the employee has presented evidence that the employer's stated non-discriminatory reason is false (*i.e.*, pretextual). Under *Hicks*, this employee's case should not survive summary judgment. The employee's case would survive summary judgment in a "no evidence" circuit, however, despite the fact that the employer has presented no legally sufficient evidence that his termination was based upon intentional discrimination.

B. The *Beaird* decision below turns on the resolution of this split.

The only evidence presented in *Beaird* below was evidence of pretext. This evidence, the panel majority held, required reversing the district court's entry of summary judgment because under the Tenth Circuit's "no evidence" standard, a genuine issue of material fact as to pretext necessarily precludes summary judgment.

The dissent would have rejected the "no evidence" approach and would instead have required plaintiffs to raise a genuine issue of material fact as to intentional discrimination. Sometimes, the dissent noted, this may be done solely by evidence of pretext when "the pretextual evidence [is] of a nature or quality from which a reasonable jury could infer illegal discrimination."[22] That was not the case in *Beaird*, however.

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[22] *Beaird*, 145 F.3d at 1169.

II. This Court should grant the petition to resolve this multi-circuit split concerning an important and recurring question of federal law.

The standard of proof necessary to avoid summary judgment is a critical issue in every disparate treatment employment discrimination case.

Employment discrimination cases are the most common type of case filed in federal courts, with the exception of criminal and prisoner-related cases.[23] This burgeoning area of federal litigation is growing at a rapid pace. During the 12-month period ending March 31, 1993, employment discrimination filings numbered 11,725.[24] For the same period ending in 1997, the number had soared to 23,547.[25] These figures do not include employment discrimination cases filed in state courts under state laws that mirror Title VII. Clarifying the summary judgment standard in pretext cases will also impact large numbers of state court cases because many – if not most – state courts pattern their summary judgment practice on federal practice.

There is every indication that this trend will continue, and possibly increase at an even more accelerated pace, if the split is not resolved. For example, since 1993, when *Hicks* was decided, 425,330 charges of discrimination

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[23] *See Judicial Business of the United States Courts*, at tbl. C-2A (Administrative Office of the Courts 1998).

[24] *Id.*

[25] *Id.*

have been filed with the EEOC.[26] The EEOC openly acknowledges that it follows the "no evidence" reading of *Hicks* by making cause findings in every case in which a charging party raises a question as to pretext, even if the charging party has only stated a *prima facie* case and raised a question as to pretext.[27] The EEOC believes that "[this] Court agreed with the Eighth Circuit's conclusion that no other proof is required when the fact finder rejects the defendant's reasons."[28]

As a result, it is reasonable to assume that the federal court system will be inundated with new cases in every circuit if a charging party merely challenges the employer's proffered reason for a job action, even if the particular circuit disagrees with the EEOC's reading of *Hicks*.[29]

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[26] The U.S. Equal Employment Opportunity Commission, *Charge Statistics FY 1991 through FY 1997*, <http://www.eeoc.gov/stats/charges.html>.

[27] *EEOC Enforcement Guidance on St. Mary's Honor Center v. Hicks*, EEOC Compl. Man. (BNA) ¶ 2099 (Apr. 12, 1994) (emphasis added).

[28] *Id.*

[29] *See, e.g.*, *Woods*, 30 F.3d at 260 n.3 ("The EEOC would like a blanket statement that once evidence of pretext is proffered, that evidence along with the prima facie case will at all times shield plaintiff from adverse summary judgments.").

Summary judgment plays a crucial role in discrimination cases.[30] It prevents non-meritorious suits from proceeding to trial.[31] At the same time, it saves litigants and the judicial system substantial costs. In testimony before Congress eight years ago, the U.S. Chamber of Commerce explained how substantial the cost of defending a case through trial can be for employers:

> [e]xperience has shown that the average cost of defending a single plaintiff employment discrimination action through trial can be between $100,000 and $150,000, and often it is much more.[32]

Because of the large number of discrimination cases, improper application of the summary judgment standard leads to a substantial waste of judicial resources.[33] This error is magnified in the employment discrimination context.

In 1994, 4,330 civil cases were tried to federal court juries.[34] Of those cases, 477 – or 11% – were employment

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[30] *Bursting Bubbles*, *supra* note 8, at 209.

[31] *Id.* at 210.

[32] *The Civil Rights Act of 1996: Hearings on S.2104 Before the Senate Committee on Labor and Human Resources*, 136 Cong. Rec. S.3144, 101st Cong.; 2nd Session (1990) (Statement of James C. Paras, Esq.).

[33] *Id.*

[34] *Judicial Business of the United States Courts*, at tbl. C-2A (Administrative Office of the Courts 1998).

cases.[35] By 1998, the total number of civil cases tried to juries remained stable, at 4,361.[36] The number of those cases that were employment cases, however, has exploded to 912, or 20.9%.[37]

Concern over this explosion was echoed recently by commentators discussing the post-*Hicks* "no evidence" circuit split in summary judgment cases:

> The effect is that district courts in these ["no evidence"] circuits, as a practical matter, are precluded from granting an employer's motion for judgment based upon sufficiency of the evidence.[38]

CONCLUSION

The split among the circuits is causing litigants and courts to spend substantial monetary and judicial resources managing employment discrimination cases in "no evidence" circuits.

The lower courts and employers urgently require guidance from this Court to resolve the split. The circuits that essentially apply a "per se jury trial rule" in employment discrimination cases are incorrect in relying on this Court's decision in *Hicks* to support that rule. This

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[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Bursting Bubbles*, *supra* note 8, at 207.

Court should grant Seagate's Petition and resolve the split among the circuits.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1998

SEAGATE TECHNOLOGY, INC.,

Petitioner,

vs.

MAUDIE BEAIRD, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

In October, 1993, the Petitioner decided to reduce its workforce. Seagate had a written Reduction In Force policy under which reductions would be determined by operational needs, performance, potential and, if those were equal, seniority. In the case of these Respondents, some of Seagate's managers used the opportunity to eliminate employees not because of operational needs but because of internal biases arising from the age, race or gender of the employees.

These individual discriminatory actions gave rise to a small number of lawsuits with most claims being dismissed by the trial judge who improperly — as evidenced by the Court of Appeals decision — weighed the evidence and disregarded competent evidence.

The result of the appeal is that the claims of seven litigants were remanded for trial and summary judgment as to one litigant (Ms. Beaird) was affirmed.

Each of these plaintiffs proved a prima facie case and presented evidence that the employer's explanation was pretextual in the sense that the explanation was disproved leaving a proper inference of discrimination.

In the case of Ruth Noran, there was evidence

> that Seagate improperly manipulated her final . . . performance evaluation . . . in order to ensure that she would be terminated. Under the RIF criteria, had Noran's 240 point score stood unaltered, she would have had a . . . score of three and been retained.

Beaird v. Seagate Technology, Inc., 145 F.3d 1159, 1169 (10th Cir. 1998).

> [M]ore than two months after Seagate claims to have completed the 180-point/grade two performance evaluation that ostensibly led to Noran's termination, the company was describing her on internal documents as having 240 points.

Id.

Rosa Clark "established a sufficient basis to find the differentiation of job codes 1433 and 1432 pretextual", *id.* at 1172, and "[t]here is no shortage of" "retained employees in job code 1432 who [are] younger than she, less senior, and rated as a three". *Id.*

In the case of Ms. Bobo, Ms. Bush and Ms. Johnson, "all three can legitimately establish age and race discrimination by pointing to younger, white employees retained in job code 1432." *Id.* "In addition, Johnson establishes pretext by raising the inference that her final [score] may have been manipulated". *Id.* A document

> dated July 13, 1993, which is *after* the claimed date of her final . . . evaluation . . . . lists Johnson's "Last Performance Rating," dating from December 28, 1992, as a four, and states that Johnson has since "continued to perform at the same rating level."

Id. The Circuit properly found this discrepancy "shocking". *Id.*

Ms. Jones showed that Seagate deviated from its written selection criteria by not considering potential and "[t]hat deviation disadvantaged Jones because, as a three-performer with potential . . . she would not have been laid-off". *Id.* at 1173. Jones also presented evidence which "raises the inference that Jones achieved a four rating that was suppressed for purposes of including her in the RIF." *Id.* at 1174.

Finally, Mr. Henson presented evidence "that Seagate was hiring into positions similar to Henson's at the very time it claimed the elimination of positions such as Henson's was operationally required." *Id.* at 1174.

This evidence of pretext was consistent with efforts to weed out employees because of age, race or gender — the claims that these plaintiffs raised — and it did not point to any other non-discriminatory explanation. Indeed, the panel was unanimous that the evidence as to six of those seven plaintiffs satisfied even the pretext-plus standard advanced by Judge Tacha. *See Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159, 1175 (10th Cir.1998) (Tacha, J., concurring in part, dissenting in part) ("I concur in the judgment, except with respect to Plaintiff Ruth Noran.").

As a consequence, Petitioner is seeking review of an interlocutory order (one merely denying summary judgment) in a case where, even if Petitioner's theory were accepted, the result would not change for at least six of the seven litigants.[1]

With this background in mind, Respondents will show the writ should be denied.

SUMMARY OF THE ARGUMENT

Petitioner and Amicus urge that there is a "clear split" in authority among the Circuits as to "the appropriate standard for summary judgment in disparate treatment employment discrimination cases." Brief of Amicus, pg 2.

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1. At most there is the *possibility* that one of the other two judges would agree that Ms. Noran did not meet a pretext-plus standard. It is more likely, however, that the other Judges would hold that Mr. Noran's case — like the other six — was sufficient regardless of the standard applied.

This is, however, neither the issue presented for review nor an accurate statement of the law in the Circuits.

Petitioner has propounded only one question for review:

> Whether, despite a showing of pretext, the court can enter judgment as a matter of law for the employer at the summary judgment stage?

Petitioner has not asked this Court to determine or refine the summary judgment standard to be used in employment cases, but has only asked whether summary judgment is possible "despite a showing of pretext". Petition, **QUESTION PRESENTED FOR REVIEW**.

As the Tenth Circuit already recognizes that summary judgment may be entered "despite a showing of pretext", even an affirmative answer to that question will not affect the decision below nor modify the Circuit's existing rule and will not affect the Court's opinion as to these Respondents.

Because the question posed is inadequately defined, any answer would be only hypothetical and not affect the merits of the decision. Further, because the question is not sufficiently refined, the Petition presents issues which are not beyond the scope of the question thus leaving this Court with uncertainty about what issues will actually be presented and argued if certiorari is granted. Finally, the Petitioner and Amicus have not properly examined the rule of the Circuit Courts in the context of the question posed and therefore present a claimed "inter-circuit split" which is, in fact, illusory. Reviewing this decision would, therefore, be a waste of this Court's precious and limited resources.

REASONS FOR DENYING THE WRIT

There are a number of compelling reasons for denying the proposed writ. These reasons include:

A. The lack of a clear inter-circuit conflict,

B. The waste of this Court's resources; and

C. The correctness of the Tenth Circuit position in light of this Court's precedent.

It should also be pointed out that as to one of the Petitioner's grounds for review — D. — Context Evidence/Amplified Concerns In RIF Situations — this ground does not relate to the sole question submitted for review.

Respondents will address each of these reasons in turn.

A.

THE CLAIMED INTER-CIRCUIT CONFLICT IS ILLUSORY

Petitioner poses only one question:

> Whether, despite a showing of pretext, the court can enter judgment as a matter of law for the employer at the summary judgment stage?

This question, however, is not the subject of the arguments advanced by either Amicus or the Petitioner. Rather, the Amicus and Petitioner argue the existence of an inter-circuit conflict on a different issue: what kind of pretext evidence is necessary to preclude summary judgment. Even as to this, the arguments do not make it clear whether the Petitioner and Amicus believe a

"pretext-plus" doctrine should be imposed, whether it is sufficient that the evidence of pretext point toward discrimination or whether it is enough if the evidence of pretext merely is not inconsistent with discrimination.

Because Petitioner does not adequately identify the issue which this Court should decide, neither their analysis of the purported inter-circuit conflict nor their arguments addressing the legal issues are consistent. Respondent would suggest that this lack of precision in formulating the question strongly counsels that this is not the right case for certiorari. This Court should neither be put to the task of sorting through the arguments to determine what the real issues are nor to be asked to determine post hac what question this Court will decide.

Nonetheless, even if the question is deemed adequately framed, there is no real split among the circuits.

In substance the circuits have uniformly adopted a rule of permissive pretext-only in which a showing of pretext following the prima facie case may be sufficient to prove discrimination but does not require a finding of discrimination. The ultimate fact determination of whether discrimination is proven is a matter which is reviewed, as is any other fact finding, for clear error. Thus, the determination of discrimination which flows from pretext must be rational and must be supported by more than a scintilla of evidence.

This underlying rationale is followed regardless of the differing terminology and thus presents no split among the circuits requiring resolution by this Court.

Because so much of the argument is over semantics, Respondent would initially clarify the terms used. Properly defined, the "pretext-only" doctrine "simply requires that a plaintiff prove

that the defendant's proffered reason is pretextual. Once this is proven, the plaintiff is entitled to judgment as a matter of law." *Kline v. Tennessee Valley Authority*, 128 F.3d 337, 343 (6th Cir. 1997). "Permissive pretext-only" is an analysis where "if the plaintiff establishes that the defendant's reasons are pretextual the trier of fact is permitted, but not required, to enter judgment for the plaintiff." *Id.*

> Under the "pretext plus" strand of analysis, a plaintiff acquires an additional burden. The plaintiff must not only demonstrate that the employer's reasons were pretextual, but the plaintiff must also introduce additional evidence of discrimination.

Id.

This Court in *St. Mary's Honor Center v. Hicks*, 509 U.S. 197 (1993) sought to eliminate this confusion by adopting the "permissive pretext only" standard and, indeed, the Circuits are now in remarkable accord that this is the standard to be followed.

Contrary to the arguments of Petitioner and Amicus, all en banc decisions of the Circuits follow the "permissive pretext-only" standard. Even those few circuits which have, in dicta, appeared to embrace pretext-plus actually hold to a "permissive pretext-only" requirement because they do not actually require evidence beyond that used to prove the prima facie case and to disprove the employer's explanation. Several circuits have surveyed these standards and noted the general agreement of the courts. *See Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997), *cert denied*, 118 S. Ct. 685 (1998):

> [I]n considering whether the [permissive pretext only] rule established in our precedents "ought to be the law", it is of no small moment that eight of

> the ten other circuits that have considered the question are in agreement with our interpretation of *Hicks*. Thus far, only the First and Fifth Circuit have issued opinions expressing a contrary view, and in neither opinion was that expression actually a holding.
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> * * *
>
> The fact remains that the contrary dicta in the First and Fifth Circuit decisions are just that: dicta . . .

106 F.3d at 1536.

The Third Circuit in *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3d Cir. 1996) (en banc) also surveyed the state of law on this subject and found consensus among the holdings of the D.C. Circuit, the Second Circuit, the Fourth Circuit, the Sixth Circuit, the Seventh Circuit, the Eighth Circuit, and the Ninth Circuit.

The Eighth Circuit in *Ryther v. KARE 11*, 108 F.3d 832, 837 n.3 (8th Cir.), *cert. denied*, 117 S. Ct. 2510 (1997) expressed agreement with Sheridan's compilation and with the inclusion of the Eighth Circuit in the permissive pretext-only group.

Indeed, those Circuits which, in dicta, nominally adopted a "pretext-plus" approach actually do not mandate evidence beyond the prima facie case and pretext; they only require that the totality of the evidence be sufficient to warrant the underlying determination of discrimination. For instance the First Circuit, which is listed as a "pretext-plus" jurisdiction explains that its " 'pretext plus' approach does not necessarily require the introduction of additional evidence." *Dichner v. Liberty Travel*, 141 F.3d 24 (1st Cir.1998).

> [I]f the plaintiff establishes that the defendant's proffered reasons for the adverse employment actions are not the true reasons, the trier of fact may, depending on the overall evidence, but is not required, to infer that intentional age-based discrimination was a determinative factor.

Kelley v. Airborne Freight Corp., 140 F.3d 335, 348 (1st Cir. 1998). Similarly, the Fourth Circuit[2] explains that under its "pretext-plus" approach "establishing a prima facie case and raising factual issues regarding the employer's reasons may permit a factfinder to infer the ultimate fact of age discrimination." *Thomas v. Randolph Hills Nursing Center*, 155 F.3d 561 (4th Cir. 1998) (Table) (unpublished), 1998 WL 454088 at **2.[3] The Fifth Circuit holds that "evidence of pretext will permit a trier of fact to infer that the discrimination was intentional". *Rhodes v. Guibertson Oil Tools*, 75 F.3d 989, 993 (5th Cir. 1996) (en banc), *cert. denied*, 502 U.S. 868 (1997).

In short, even the First, Fourth and Fifth Circuits apparently recognize the "permissive pretext-only" standard but merely

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2. The Fourth Circuit had been considered to follow a permissive pretext-only rule as set out in *Combs v. Plantation Patterns*, 106 F.3d at 1536, *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3d Cir. 1996) (en banc) and *Ryther v. KARE 11*, 108 F.3d 832, 837 n.3 (8th Cir.), *cert. denied*,117 S. Ct. 2510 (1997). Since the Fourth Circuit has not yet addressed the issue en banc it would be inappropriate to assume that it has abandoned its prior precedents.

3. Petitioner had relied primarily on *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 2511 (1997) but both the holding and the reasoning of *Isenbergh* have been specifically repudiated within the Eleventh Circuit. *See Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997), *cert denied*, 118 S. Ct. 685 (1998) and *Arrington v. Cobb County*, 139 F.3d 865, 875 n.21 (11th Cir. 1998).

choose to label their tests in such a way which emphasized that the inference of intentional discrimination must be rational rather than automatic. A difference in semantics, however, is not a difference in substance.

For there to be a substantive split in the Circuits it would have to be shown that proof of pretext automatically translated into proof of discrimination. No Circuit since *Hicks* has gone so far. All circuits appear to recognize that the inference of discrimination arising from pretext is permissive, not automatic, and that — at least in some circumstances — evidence of pretext will not preclude summary judgment.

This understanding is crucial in the context of Petitioner's sole question: "Whether, despite a showing of pretext, the court can enter judgment as a matter of law for the employer at the summary judgment stage?"

The Tenth Circuit already recognizes that "despite a showing of pretext, the court can enter judgment as a matter of law for the employer at the summary judgment stage". *See Randle v. City of Aurora*, 69 F.3d 441, 451 n.14 (10th Cir. 1995):

> Of course, in the unlikely event that the plaintiff concedes that the real, albeit concealed reason for the employment decision was a motive that itself is not prohibited under the civil rights laws, that plaintiff would remain vulnerable to summary judgment because the plaintiff's concession of a lawful motive would take the issue of motive from the jury and preclude the inference of a discriminatory motive that the jury could otherwise draw from the fact of pretext. For example, if a defendant stated that the plaintiff was fired for unexcused absences and the plaintiff offered

> evidence that the reason was pretextual and contended instead that he or she was really fired because the boss wanted to make that job available to his or her spouse, the defendant would be entitled to summary judgment because of plaintiff's concession that the true reason was not a prohibited discriminatory reason, even if it was concealed. . .

Accord Marx v. Schnuck Markets, Inc., 76 F.3d 324, 328 (10th Cir. 1996) ("if a civil rights plaintiff concedes that the real reason for the employer's action was a motive not prohibited under the civil rights laws, such a concession mandates granting summary judgment to the employer").

The recognition that some proofs of pretext may be inconsistent with proof of intentional discrimination is the common rule[4] and it has already been answered in the Tenth Circuit in the manner Petitioner urges. It may be that Petitioner believes that the Tenth Circuit's application of this rule on summary judgment is too restrictive and that some other rule should apply, ie: that proof of pretext should be required to point specifically toward

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4. *Cf. Aka v. Washington Hospital Center*, __ F.3d __ (D.C. Cir. 1998) 1998 WL 698396, *9 (en banc) (reaffirming commitment to permissive pretext-only but noting that "the plaintiff cannot always avoid summary judgment by showing the employer's explanation to be false"); *Fisher v. Vassar College*, 114 F.3d 1332, 1333 (2d Cir. 1997) (en banc), *cert. denied*, __ U.S. __, 118 S. Ct. 851 (1998) ("evidence constituting a prima facie case prior to the employer's proffer of a reason, coupled with the error or falsity of the employer's reason may — or may not — be sufficient to show illegal discrimination"); *Ryther*, 108 F.3d 832, 837 n. 2 ("there may be cases where the evidence of pretext is inconsistent with an inference of intentional discrimination."), and *Rhodes v. Guibertson Oil Tools*, 75 F.3d 989, 993 (5th Cir. 1996) (en banc), *cert. denied*, 502 U.S. 868 (1997) ("We are convinced that ordinarily such verdicts [based on proof of pretext] would be supported by sufficient evidence, but not always.").

discrimination in order to avoid summary judgment or possibly that some additional proof beyond pretext should be required. The Petition, however, does not pose such questions, analyze whether the Circuits are split on such issues nor even explain why the minutia of such treatment in the weight accorded pretext would warrant the consideration of this Court.

WHEREFORE, an illusory inter-circuit conflict and an inadequately framed question do not warrant the granting of certiorari.

B.

THE WASTE OF THE COURT'S RESOURCES

The factual posture of this case and the nature of the question presented do not provide an appropriate vehicle to consider the question Petitioner seeks to advance.

As has already been pointed out, the answering of the broad question posed by Petitioner would do nothing to affect the resolution of this case. The Tenth Circuit already agrees that proof of pretext does not always preclude entry of summary judgment. Therefore granting certiorari and stating that pretext does not automatically prevent imposition of summary judgment would not change the rule in the Tenth Circuit nor the outcome of this case.

Even had the Petitioner urged a different question — that proof of pretext must also point in the direction of discrimination to preclude summary judgment — answering that different question would not change the underlying outcome.

The dissenting Judge Tacha espoused a standard under which pretext should also point toward discrimination, but even she agreed that all litigants except Ruth Noran had met the standard

she proposed. *See Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159, 1175 (10th Cir. 1998) (Tacha, J., concurring in part, dissenting in part) ("I concur in the judgment, except with respect to Plaintiff Ruth Noran."). Even as to the seventh Respondent (Ms. Noran), it is uncertain whether an affirmative answer to Petitioner's question would change the view of the other two judges because the majority believed the evidence of pretext could fairly be interpreted as a deliberate manipulation of her rating designed to secure her termination.

Consequently, Petitioner would have this Court expend its resources to decide a question which will not affect the outcome of the litigation in a context where the facts have not been fully litigated or the issues clarified by trial.

Should Petitioner's question even be worthy of review, the appropriate vehicle for review ought to necessarily be a terminal order — one affirming summary judgment — rather than an interlocutory order which merely denies judgment and allows the case to proceed to trial. At this non-final stage of the proceedings the Court would be acting on an incomplete record and would be acting contrary to this Court's long-standing recognition that a judge "may [always] deny summary judgment in a case where there is a reason to believe that the better course would be to proceed to a full trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Perhaps the clearest example of why the record and issues are not properly developed for review lies in examining the primary fact scenario advanced by Petitioner as the example of the "harm" inherent in the permissive pretext-only rule. Petitioner asserts:

> An example of this [supposed evil] is found in *Beaird*, 145 F.3d at 166 n.3, 1175. The majority notes that Seagate's explanation for terminating one respondent was because he was the only employee

> in his job code that received a "two" rating on his last performance evaluation, which was the lowest rating in that job code. *Id.* In other words, Seagate' explanation for terminating him was because his job performance was the least satisfactory of any employee in his job code. *Id.* However, the majority held that the employee insisted "that his work was satisfactory . . . which was sufficient to satisfy this element of the prima facie case." *Id.* at 1166 n. 3. Thus, the employee created a genuine issue of material fact simply by disputing perceptions about the quality of his work recorded on a previous performance appraisal. The employee disputes Seagate's explanation, so he gets to proceed to a jury trial.

Petition for Certiorari, pg 9.

The above is neither a correct statement of the facts of the case, the Circuit's holding nor even of the issue advanced for review.

Mr. Henson's perceptions of his work had nothing to do with the pretext analysis. Rather pretext was established because as to Henson's job code, the legitimacy of the supposed reduction itself was called into question. This was explained by Judge Tacha who urged the pretext-plus standard which Petitioner proposes, and who also explained that as to Mr. Henson the pretext-plus standard was satisfied:

> . . . Plaintiff William Henson was terminated from job code 276X, along with eight other employees. Henson established a prima facie case of discrimination. Defendant proffered as its nondiscriminatory reason for the lay-off that

> operational requirements dictated a reduction of nine employees in that job code. Then, Henson presented evidence that immediately prior to and during the lay-off, Seagate was advertising for four open positions in the same job code. On these facts, there is sufficient evidence to disbelieve Seagate's proffered reason for the lay-off. Henson has established pretext. Furthermore, at the time of the layoff, Henson was 52 years old. Of the other eight employees that Seagate terminated, four were over 40 years old. Because several of the terminated employees were above age 40, the pretext evidence and its surrounding context are such that a juror could reasonably infer that age was a determinative factor in Seagate's employment decision. Thus, the additional facts help to create a genuine issue of material fact about whether Seagate illegally discriminated against Henson. The question should go to the jury, which will make the ultimate decision whether or not to draw an inference of illegal discrimination.

Beaird v. Seagate Technology, Inc., 145 F.3d 1159, 1178 (10th Cir. 1998) (Tacha, J., concurring in part, dissenting in part).

The complaint which Petitioner advances, is one that goes to the prima facie case. Apparently Petitioner believes that an employee's testimony as to his or her level of performance should be not be sufficient to establish a prima facie case.[5] Petitioner,

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5. *Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159, 1166 n.3 (10th Cir.1998). The Tenth Circuit "follow[s] [the] majority of circuits that have 'refus[ed] to consider a defendant's proffered reasons for discharge in assessing the existence of prima facie case' ". *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1005 n. 8 (10th Cir. 1996) (quoting *McDonald v. Eastern Wyoming Mental Health Center*, 941 F.2d 1115, 1119 (10th Cir. 1991)).

however, does not propose review of the Circuit's prima facie formulation. Indeed, Petitioner does not even challenge that formulation let alone assert that there is a circuit split on the matter or that the standard used is contrary to the precedent of this Court. Thus, answering the question posed would not affect the fact scenario actually faced by the Circuit nor would it address the "evil" propounded by the Petitioner.

Again, this emphasizes that by accepting certiorari this Court would be presented with a host of arguments not related to the question advanced.

This Court's time and resources are limited. This Court should limit its inquiry to matters which have been carefully and accurately delineated and which arise in factual context sufficiently developed to allow for accurate determination. Those resources should not be wasted on a Petition wherein the Petitioner advances arguments and scenarios which are unrelated to the sole question posed for review.

WHEREFORE, the Petition should be denied.

C.

BEAIRD IS CORRECT ON THE MERITS

In parts (B) and (C) of its Petition, Petitioner asserts that the Tenth Circuit's permissive pretext-only rule automatically defeats summary judgment and that this is contrary to established precedent. As pointed out, this assertion is not correct because the Tenth Circuit recognizes that proof of pretext may, in some cases, be inconsistent with the ultimate proof of discrimination such that summary judgment will be appropriate.

Nonetheless, that a prima facie coupled with pretext will normally suffice to present a triable issue is certainly neither novel nor in conflict with this Court's precedent.

Denying summary judgment when the evidence of the employer's intent is in conflict is not novel, unsettled or contrary to prior law; it is the normal rule of summary judgment applicable in every case.

> [I]t is clear enough. . . that at the summary judgment stage the judge's function is not himself to weight the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). As this Court further stated, Rule 56, Fed. R. Civ. P:

> by no means authorizes trial on affidavits. Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge [when] ruling on a motion for summary judgment . . .

Id. 477 U.S. at 255.

When the employer proffers a non-discriminatory explanation for its actions, which is shown to be false it will ordinarily be rational to infer an unlawful motive.

> An employer who concocts a false explanation for an employment decision is in a like position to a criminal defendant who offers a false alibi: the jury may consider the fact that the defendant has presented a false alibi in deciding his guilt.

Aka v. Washington Hospital Center, supra, __ F.3d at __, 1998 WL 698396 at *10.

> . . . *Hicks* also made plain that a lie "carries substantial risks", including the risk of sanctions, *Hicks*, 509 U.S. at 521-22, 113 S.Ct. 2742, and the more mundane risk that the lie will lead the jury to draw an adverse inference. Indeed, the employer's fear that the jury will draw an adverse inference from a false explanation is a vital element of the *McDonnell-Douglas* burden-shifting procedure. Without it, employer's would have little incentive to look for and present the real reasons for their employment decisions, undercutting the purpose of the *McDonnell-Douglas* framework, which is "to compensate for the fact that direct evidence of intentional discrimination is hard to come by." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). . .

Indeed, the drawing of inferences of guilt or guilty knowledge from the giving of a false explanation is one of the oldest and most settled tenants of evidence. *See Ashcraft v. Tennessee*, 327 U.S. 274, 278 (1946) (false exculpatory statement "has always been considered as evidence of guilt.").

Juries are routinely instructed that dissembling by a party may properly be considered as proof of guilt. *See* 1 Edward J. Devitt, et al., Federal Jury Practice and Instructions § 15.06; 1 Leonard B. Sand, et al., Modern Federal Jury Instructions ¶ 7.01 (Instruction 7-19) (if witness testifies untruthfully, jury may disbelieve all other portions); 1 Devitt, et al., § 14.08; 1 Sand et al., ¶ 6.05 (Instruction 6-9) (flight from scene of crime may be considered evidence of guilt); 1 Sand, et al., ¶ 6.05 (Instruction 6-10) (use of a false name); 1 Sand, et al., ¶ 6.05 (Instruction 6-12) (fabrication of an alibi); 1 Devitt, et al., § 14.07 (falsification of evidence); 1 Sand, et al. ¶ 6.05 (Instruction 6-14) and 1 Devitt, et al, § 14.07 and 1 Sand, et al., ¶ 6.05 (Instruction 6-16) (intimidation of witnesses), and 1

Sand, et al., ¶ 6.06 (Instruction 6-19) (engaging in clandestine behavior).

It is therefore merely an application of the ordinary rules of evidence that juries are instructed that dissembling by employers allows, but does not require, an inference that the employer acted from an unlawful motive. *See* 3 Edward J. Devitt, et al., Federal Jury Practice and Instructions § 104.04 (1987); 1 Leonard B. Sand, et al., Modern Federal Jury Instructions ¶ 87.01 (Instruction 87-27) (1996) (a jury may infer discriminatory motive from the consciousness of guilt reflected by dishonest statements about an adverse employment action).

Indeed, Petitioner has offered no authority suggesting that it is either novel or contrary to precedent to deny summary judgment for an employer who has made a false explanation and to, instead, allow the jury to "decide which party's explanation of the employer's motivation it believes." *U.S. Postal Service Bd of Govs v. Aikens*, 460 U.S. 711, 716 (1983).

WHEREFORE, the Petition for a Writ should be denied because the Tenth Circuit's standard is neither a novel nor unsettled point nor one which runs contrary to the precedent of this Court.

D.

SPECIAL RIF CONCERNS

Petitioner's argument in Part (D), Petition, pg 15-17, is puzzling because it again appears to be addressed to a matter outside the scope of the proposed question. Part (D) appears to assert that there should be a special summary judgment rule applicable to RIF settings, however Petitioner does not propose this as a separate question for review. Petitioner does not suggest that there is an inter-circuit conflict on this issue, does not argue

that the *Beaird* decision conflicts with this Court's precedent and does not even argue that the matter is a novel or unsettled issue. Indeed, Petitioner does not even define the particular question related to "special RIF concerns" it would have this Court address.

Rather Petitioner merely makes general arguments that in a RIF setting the employer's over-all pattern of conducting terminations should be capable of sustaining summary judgment. Although Petitioner disagrees with the Tenth Circuit's holding that such evidence is not conclusive, Petitioner seems to acknowledge that such is exactly what this Court has previously ruled, ie: that the favorable treatment of other employees in the protected class cannot be a conclusive defense to a claim of individual discrimination. *See Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978) (fairness to the class of women employees as a whole could not justify unfairness to the individual female employee because the "statute's focus on the individual is unambiguous."[6]); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579 (1978) ("A racially balanced work force cannot immunize an employer for liability for special acts of discrimination.") and *Connecticut v. Teal*, 457 U.S. 440, 455 (1982) ("It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group.").

Since Petitioner does not argue that the *Beaird* treatment of such "statistics"[7] conflicts with this Court's precedent cited above

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6. Paraphrasing is from *Connecticut v. Teal*, 457 U.S. 440, 455 (1982).

7. Respondents are leery of classifying the proffered evidence as "statistical" because the evidence does not take into account any relevant variables nor was it compiled in accordance with any statistical norms. The Circuit merely found it unnecessary to consider these deficiencies because, even if accepted, the Petitioner's proffer was not dispositive.

or the precedent of any other circuit, Petitioner has advanced no basis under the rules of this Court for addressing the issue even were it within the scope of the sole question presented for review.

WHEREFORE, this argument neither supports granting review on the proposed question nor sets out a separately reviewable issue.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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